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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 346

JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 19, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. .....

JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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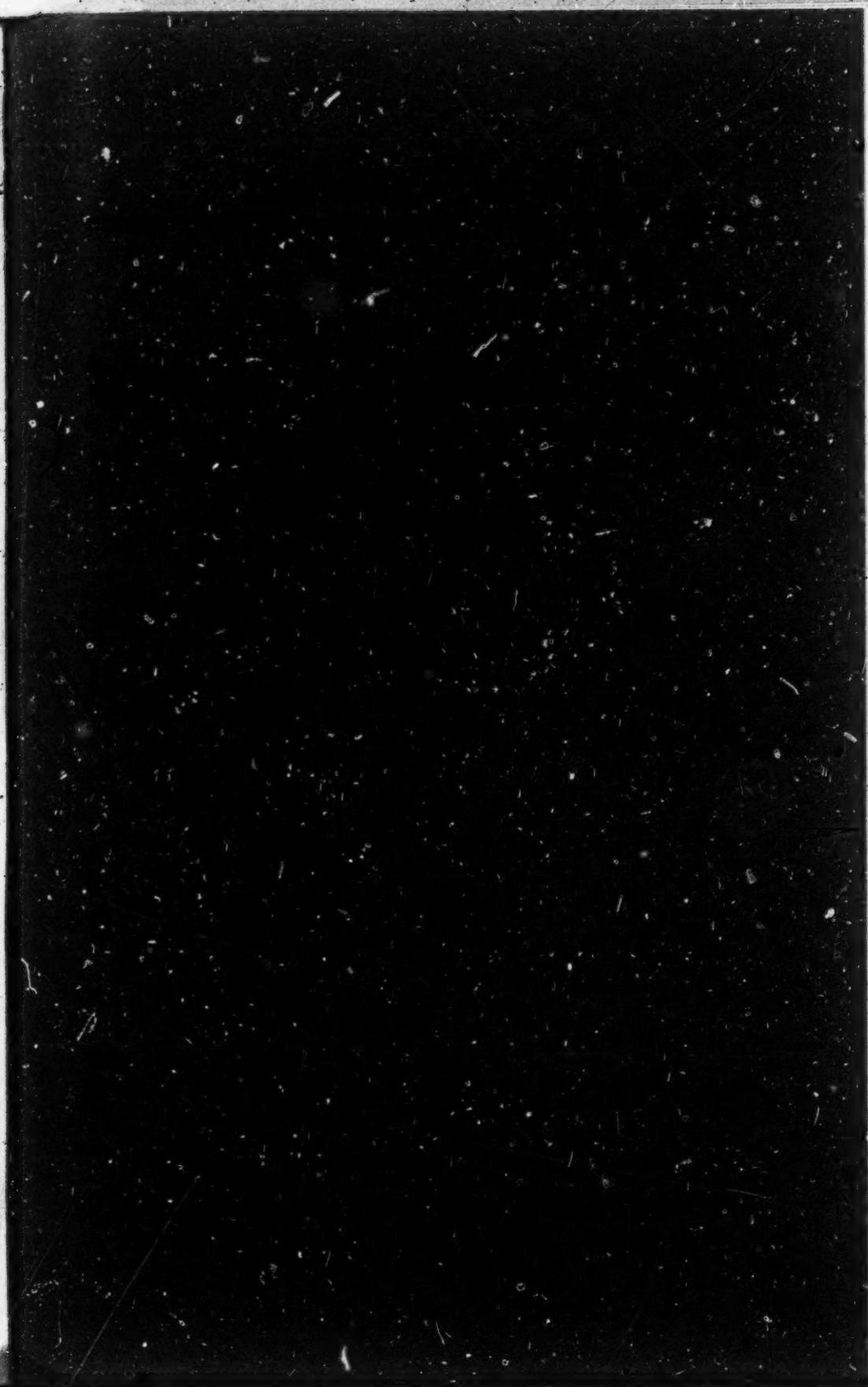

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IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

No. 7049

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
Respondents.

Counsel for Petitioner:
MR. SAMUEL O. CLARK, JR.,
MR. SEWALL KEY.
Counsel for Respondents:
MR. FRANCIS E. BALDWIN.

Petition for Review of Decision of the United States Board of Tax Appeals.

J-15603 The Gunthorp-Warren Printing Company, Chicago—9-13-39—35

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Jeremiah D. Maguire and Ruth S. Maguire,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 72216.

Appearances:

For Taxpayer: James A. Councilor, J. E. Brown, Esq.

For Comm'r: Brooks Fullerton.
Transferred to Mr. Smith 1/21/39.

1933.

May 11—Petition received and filed. Taxpayer notified. (Fee paid).

May 11—Copy of petition served on General Counsel.

June 29—Answer filed by General Counsel.

July 11—Copy of answer served on taxpayer.

1934.

Sept. 25—Notice of appearance of James A. Councilor as counsel, filed.

Sept. 25—Application for order to take depositions filed by taxpayer.

Oct. 2—Order to take deposition of Wm. E. Spratt, entered.

Nov. 28—Deposition of Wm. E. Spratt filed (2). Taxpayer served by notary. Commissioner served by Board. 11/30/34 copy served.

1935.

Dec. 19—Notice of appearance of James A. Councilor as counsel, filed.

Dec. 19—Notice of the withdrawal of J. Marvin Haynes, counsel for taxpayer, filed.

1937.

Oct. 27—Motion to consolidate with Dockets 90338 to 90344, inclusive for hearing and disposition filed by General Counsel.

Oct. 29—Motion to consolidate with dockets 90338 to 90344, inclusive for hearing and disposition, granted.

Nov. 20—Hearing set Feb. 14, 1938.

1938.

Jan. 17—Motion for a continuance filed by taxpayer. 1/18/38 granted to 5/2/38.

Apr. 19—Motion for continuance filed by taxpayer. 4/2/38 granted and continued to 5/17/38.

May 17—Hearing had before Mr. Mellott. Division #11, on merits. Submitted. Entry of appearance of J. E. Brown, stipulation of facts and amendment to answer filed. Petitioner's brief due 6/16/38; respondent's due 7/16/38; Reply due 8/1/38.

2 May 27—Transcript of hearing 5/17/38 filed.

June 14—Brief filed by taxpayer. 6/15/38 copy served on General Counsel.

Aug. 23—Motion to reopen the hearing to file amendment to stipulation of facts, filed by General Counsel.

Aug. 24—Motion to reopen the hearing to file amendment to stipulation of facts granted.

Aug. 24—Motion for leave to file the attached brief, brief lodged by General Counsel. 8/25/38 Granted.

Oct. 10—Motion for leave to file the attached reply brief filed by taxpayer. 10/10/38 granted.

Oct. 10—Reply brief filed by taxpayer.

Oct. 10—Copy of motion and reply brief served on General Counsel.

1939.

Feb. 28—Memorandum findings of fact and opinion rendered, Charles P. Smith, Div. 5. Judgment will be entered under Rule 50.

Mar. 21—Computation of deficiency filed by General Counsel.

Mar. 23—Hearing set April 12, 1939 on settlement under Rule 50.

Mar. 27—Consent to settlement filed by taxpayer.

Mar. 29—Decision entered, Charles P. Smith, Div. 5.

June 21—Stipulation of venue filed.

June 21—Petition for review by United States Circuit Court of Appeals, Seventh Circuit, with assignments of error filed by General Counsel.

July 1—Proof of service filed by General Counsel.

July 6—Proof of service filed by General Counsel, (J. D. & Ruth Maguire).

July 14—Certified copy of an order from United States Circuit Court of Appeals, 7th Circuit, directing the clerk of the Board to transmit, prepare and complete record in the Maguire case and abbreviated records in the remaining cases, filed.

July 22—Praecipe filed by General Counsel.

July 31—Proof of service of praecipe filed.

3 UNITED STATES BOARD OF TAX APPEALS. Filed May 11, 1933.

Jeremiah D. Maguire and Ruth S. Maguire,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.
Docket No. 72216.

PETITION.

Filed May 11, 1933.

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:D-1:MLR-60 D), dated March 18, 1933, and as a basis of their proceeding allege as follows:

1. The petitioners are husband and wife, residing at 990 Fifth Avenue, New York, N. Y. and filed a joint income tax return for 1930.

2. The notice of deficiency (a copy of which is attached, marked Exhibit A) was mailed to the petitioner on March 13, 1933.

3. The taxes in controversy are income taxes for the calendar year 1930 and for $71,429.62.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors.

(a) The respondent has erred in his determination that ordinary income of $53,791.64 and capital net gains of
4 $657,517.91 derived from the Swift Family Realty Trust and the Union Terminal Trusts are taxable to the beneficiaries rather than to the Trusts.

(b) The respondent has erred in his determination that the basis of certain property sold by the Swift Family Realty Trust in 1929 on the deferred payment plan (on which 60 per cent. of the profits is taxable in 1930) was in excess of $5,134,817.49 and that the gain taxable in 1930 upon such sale should be computed on said basis.

(c) The respondent has erred in his determination that the basis of certain property sold by the Union Terminal Trust in 1930 was in excess of $2,109,687.19.

(d) In determining the taxable net income, the respondent erroneously increased the net income originally re-

ported by dividends of $7,035.75 received from the South San Francisco Land and Improvement Company.

(e) In determining the amount of contributions allowable as a deduction under Section 23(n) of the Revenue Act of 1928, the respondent has erroneously excluded capital net gains from the net income on which the 15 per cent. limitation is to be computed.

5. The facts upon which the taxpayer relies as the basis of this proceeding are as follows:

As to the error alleged in paragraph 4 (a) herein:

(a) Both the Swift Family Realty Trust and the Union Terminal Trust are trusts the income of which in the
5 discretion of the fiduciary may be either distributed to the beneficiaries or accumulated, and that as such the income therefrom is taxable to the Trustees, under the provisions of Section 161 and 162 of the Revenue Act of 1928.

(b) The Swift Family Realty Trust and the Union Terminal Trust were formed March 29, 1923, at which time there were transferred to the said Trusts certain properties belonging to the Estate of Mr. G. F. Swift.

(c) Certain of the properties which were acquired by the Swift Family Realty Trust in 1923 were sold on the deferred payment plan in 1929. Such properties were owned by G. F. Swift at the date of his death in 1903 and had been administered by his estate from that date until they were transferred to the Swift Family Realty Trust in 1923.

(d) The property which was thus sold by the Swift Family Realty Trust consisted of shares of stock in several land companies, and notes receivable from such companies, the Swift Family Realty Trust owning one-third of the total of all investments in and advances to the said land companies.

As to the error alleged in paragraph 4 (b) herein:

(e) The March 1, 1913 value, plus cost of net additions subsequent thereto, of the property sold by the Swift Family Realty Trust in 1929 was $5,134,817.49.

(f) This property was sold to the Geneva Corporation in 1929 for a total consideration to the Swift Family,
6 Realty Trust of $6,500,000 of which 40 per cent. was payable, and was paid, by the said Geneva Corporation to the Swift Family Realty Trust in the year 1929, and on which taxes were paid in 1929; and 60 per cent., or $3,900,000 was payable, and was paid, to the Swift Family Realty Trust in 1930.

(g) The accounts of the Swift Family Realty Trust have at all times been kept on the basis of cash receipts and disbursements.

As to the error alleged in paragraph 4 (c) herein:

(h) The sole asset owned by the Union Terminal Trust in 1923 was capital stock of Union Terminal Railway Company, St. Joseph, Mo. (of which it owned 100 per cent.) together with certain open accounts of the said Railway Company.

(i) The said capital stock of the Union Terminal Railway Company was owned by G. F. Swift at the date of his death in 1903, and from that date until the formation of the Union Terminal Trust, March 29, 1923, was administered by the estate of the said G. F. Swift.

(j) The March 1, 1913, value of the investment of the Union Terminal Trust in the said Union Terminal Railway Company, plus the cost of net additions thereto to the date of the sale of the said investment in the year 1930, was $2,109,687.19.

(k) In the year 1930 this investment was sold to the Geneva Corporation for $4,600,000 in cash.

7 As to the error alleged in paragraph 4 (d) herein:

(l) During the year 1930 the petitioners received the following cash dividends on 531 shares of stock of the South San Francisco Land and Improvement Co.:

February	1930	$5,310
June	1930	2,655
		$7,965

(m) Under date of December 15, 1930, the South San Francisco Land and Improvement Company advised its stockholders that for Federal Income Taxes the above dividends should be treated as follows:

Dates Paid	—Per Share— From Earnings Accumulated Since Mar. 1, 1913	From Surplus Accumulated Prior to Mar. 1, 1913
Jan. 31, 1930	$1.75	$8.25
Jun. 21, 1930	None	5.00

(n) In their original return of taxable income petitioners reported as taxable dividends $929.25, representing $1.75 per share on 531 shares of said stock.

(o) The Commissioner has added to the petitioners taxable income the following amounts:

February	1930	$4,380.75
June	1930	2,655.00
		$7,035.75

8 (p) The difference of $7,035.75 between the total received of $7,965.00 and the amount reported of $929.25 is a distribution from earnings of the South San Francisco Land and Improvement Company accumulated prior to March 1, 1913.

As to the error alleged in paragraph (e) herein:

(q) In determining the deduction allowable for contributions, the respondent failed to include the capital net gain, alleged in his notice of deficiency, in the net income upon which the 15 per cent. limitation is to be computed.

6. Wherefore, the petitioner prays that this Board may hear this proceeding and upon the evidence to be produced, find:

(a) That no part of the income of the Swift Family Realty Trust and of the Union Terminal Trust is taxable to the petitioners.

(b) In the event any part of the gain derived by the Swift Family Realty Trust from the sale of its properties in 1929 is found to be taxable to the petitioners, that the basis of such property is $5,134,817.49.

(c) In the event any part of the gain derived by the Union Terminal Trust from the sale of shares and accounts of the Union Terminal Railway Company is found to be taxable to the petitioners, that the basis of such property is $2,109,687.19.

(d) That $7,035.75 of the distribution of $7,965.00 received from the South San Francisco Land and Improvement Company is not taxable to the petitioners.

9 (e) In the event any part of the gains derived from the sale of capital assets by the Swift Family Realty Trust and/or the Union Terminal Trust are held to be income of the petitioners, that such gains, whether taxed as ordinary income or as capital net gains, are to be included in the petitioners' net income upon which the 15 per cent. limitation of the deduction for contributions is to be computed.

(f) Afford such further relief as the nature of the case

may require and to the Board may seem equitable and proper.

(Sgd.) J. Marvin Haynes,
J. Marvin Haynes,
Counsel for Petitioner,
916 Investment Building,
Washington, D. C.

Of Counsel:
Lybrand, Ross Bros. & Montgomery,
C. J. McGuire,
W. C. Magathau.
Dated May 10, 1933.

State of New York, }
County of ..... } ss.

Jeremiah D. Maguire and Ruth S. Maguire, both being duly sworn, say that they are the petitioners above named; that they have read the foregoing petition and are familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts they believe to be true.

(Sgd.) Ruth S. Maguire.
(Sgd.) Jeremiah D. Maguire.

Subscribed and sworn to before me this 10 day of May, 1933.

(Sgd.) Thomas J. Shanahan,
Notary Public.

11 NP-2-28

TREASURY DEPARTMENT
Washington.

Office of
Commissioner
of Internal
Revenue March 13, 1933.

Mr. Jeremiah D. and Mrs. Ruth S. Maguire,
990 Fifth Avenue,
New York, New York.

Sir and Madam:

You are advised that the determination of your tax liability for the year(s) 1930 discloses a deficiency of $71,429.82, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, If You Do Not Desire to Petition, you are requested to execute the inclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the inclosed form, or on the date assessment is made, whichever is earlier; Whereas If This Form Is Not Filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
David Burnet,
Commissioner,
By W. Sherwood,
Acting Deputy Commissioner.

Inclosures:
Statement
Form 870

12 Statement.

IT:AR:D-1
MLR-60D

In re: Mr. Jeremiah D. and Mrs. Ruth S. Maguire,
990 Fifth Avenue,
New York, New York.

Income Tax Liability.

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1930	$72,378.08	$948.46	$71,429.62

The report of the internal revenue agent in charge at New York, New York, copy of which was furnished you under date of September 22, 1932, has been reviewed in connection with information submitted to this office by the internal revenue agent in charge at Chicago, Illinois.

It appears that Mrs. Ruth S. Maguire owned an eighth interest in the Swift Family Realty Trust, Chicago, Illinois, and a like interest in the Union Terminal Trust, Chicago, Illinois.

This office holds that the income of the above-named trusts was taxable to their respective beneficiaries.

Reference is hereby made to office letter addressed to you under date of February 8, 1933, advising you of your right to extend the statutory period of limitation for assessment of income tax for the year 1930. Inasmuch as you made no reply to that letter and evidenced no desire to extend the period for assessment, it is necessary to prepare a final notice of deficiency as provided by section 272 of the Revenue Act of 1928 in order to protect the interests of the Government against the tolling of the statute of limitations with respect to the year 1930.

The distributive net income of the above named trust has been tentatively determined as follows:

Swift Family Realty Trust.

Ordinary income	$ 256,348.88
Capital net gain	$1,757,374.95

13 Union Terminal Trust.

Ordinary income	$ 173,984.22
Capital net gain	$3,502,768.35

Mrs. Maguire's taxable income is, accordingly, held subject to the following increase:

Ordinary income	
(1/8 of $256,348.88 plus $173,984.22)	$ 53,791.64
Capital gain	
(1/8 of $1,757,374.95 plus $3,502,768.35	$657,517.91

The report of the internal revenue agent in charge at New York, New York, has been adjusted as follows:

Dividends from the Southern San Francisco Land and Improvement Company have been included as 100% taxable since the 1930 income tax return of that corporation is still in process of adjustment.

Trust income has been included as explained above.

Recomputation of Tax.

Income reported on your return:		
Ordinary income		$ 63,812.53
Capital loss	$ 29,628.32	
Add:		
To adjust loss on sale of stocks, as explained on page 3 of revenue agent's report		3,237.15
Dividends — Southern San Francisco Land and Improvement Company		7,035.75
To adjust as explained on page 4 of revenue agent's report		1,034.14
Foreign dividends		617.50
From trusts:		
Ordinary income		53,791.64
Capital t gain	657,517.91	
Total	$627,889.59	$129,528.71

14 Brought forward	$627,889.59	$129,528.71
Deduct:		
Capital net loss (See page 5, revenue agent's report)	163,644.22	
To adjust contributions and allow 15% of ordinary net income		14,301.67
Revised income	$464,245.37	$115,227.04
Less:		
Dividends—your return	$265,456.24	
Add:		
Revenue agent's report	1,084.14	
Southern San Francisco Land and Improvement Company	7,035.75	
Total	$273,526.13	
Personal exemption	3,500.00	
		277,026.13
Balance subject to normal tax		None
Normal tax		None
Surtax on $115,227.04		$ 14,705.41
Tax on capital net gain, 12½% on $464,245.37		58,030.67
Total		$ 72,736.08
Less:		
Earned income credit	$ 220.00	
Tax paid at source	138.00	358.00
Net tax assessable		$ 72,378.08
Tax assessed		948.46
Deficiency		$ 71,429.62

Contributions have been adjusted on the following basis:

Ordinary net income before adjusting contributions, as shown above	$129,528.71
Your deduction for contributions	6,032.51
Total ordinary net income without deduction for contributions	$135,561.22
15% allowable as a deduction for contributions	20,334.18
Ordinary net income as finally revised	$115,227.04

Filed June 29, 1933. 15

UNITED STATES BOARD OF TAX APPEALS.

(Caption—72216)

ANSWER.

Filed June 29, 1933.

Comes now the respondent by his attorney, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, and in answer to the petition of the petitioner, admits, denies and alleges as follows:

1, 2 and 3. Admits the allegations contained in paragraphs one, two and three of the petition.

4. (a) to (e) inc. Denies that the respondent committed errors as alleged in sub-paragraphs (a) to (e) of paragraph four of the petition.

5. (a) Denies the allegations contained in paragraph five (a) of the petition.

5. (b) to (k) inc. Denies each and every allegation contained in sub-paragraphs (b) to (k) inc. of paragraph five of the petition, which is contrary to or inconsistent with the determination of the Commissioner as set forth in the notice of deficiency.

16 5. (l). Admits the allegations contained in paragraph five (l) of the petition.

5. (m) Has sufficient knowledge to form a belief as to the allegations contained in paragraph five (m) of the petition, and hence denies the same.

5. (n) and (o) Admits the allegations contained in sub-paragraphs (n) and (o) of paragraph five of the petition.

5. (p) Denies the allegations contained in paragraph five (p) of the petition.

5. (q) Admits that in determining the deduction allowable for contributions, the respondent failed to include the capital net gain in the net income upon which the 15 per cent limitation is to be computed, but denies that such action was erroneous.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be

denied and the Commissioner's determination of deficiency be approved.

(Signed) E. Barrett Prettyman,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
DeWitt M. Evans,
Special Attorney
Bureau of Internal Revenue.

17 UNITED STATES BOARD OF TAX APPEALS.

Filed May 17, 1938.

(Caption—72216)

AMENDMENT TO ANSWER.

Filed May 17, 1938.

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and as an amendment to the answer to petition herein, and for the purpose of conforming the pleadings to the proof and asserting claim to a deficiency in excess of that determined by the deficiency notice of March 13, 1933, alleges as follows:

That in the deficiency notice, a copy of which is attached to the petition herein, the Commissioner of Internal Revenue determined that the basis, for the purpose of computing the capital gain applicable to the year 1930, upon a sale of certain property of the Swift Family Realty Trust was the fair market value as of March 1, 1913, adjusted to date of sale in the amount of $3,547,041.75.

The parties hereto have filed a stipulation of fact in which it is agreed that the fair market value as of March 1, 1913 of said property adjusted to date of sale is $3,221,232.58.

Wherefore, respondent prays that the Board redetermine the additional income, and additional deficiency resulting from said lower basis, and respondent hereby
18 asserts claim to said additional deficiency.

(Signed) J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
Brooks Fullerton,
Special Attorney,
Bureau of Internal Revenue.
fjk-jpm 5-11-38

Filed May 17, 1938. 39

STIPULATION OF FACTS.

U. S. Board of Tax Appeals
Filed at Hearing
May 17, 1938

UNITED STATES BOARD OF TAX APPEALS.

Jeremiah D. Maguire
and
Ruth S. Maguire,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 72216.

Harold M. Swift,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 90338.

Gustavus F. Swift,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 90339.

Charles M. Swift,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 90340.

Charles M. Swift, T. Philip Swift, Edward F. Swift, Executors, Estate of Edward F. Swift, Deceased,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 90341.

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40 Louis F. Swift, Jr., Gustavus F. Swift, Henry Veeder, Executors, Estate of Louis F. Swift, Deceased,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 90342.

Helen Swift Neilson,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 90343.

George H. Swift,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 90344.

STIPULATION OF FACTS.

It is hereby stipulated by and between the parties hereto that for the purpose of the above-entitled proceedings the following facts shall be taken as true. Each party reserves the right to introduce other evidence not inconsistent herewith or to object to the consideration by the Board of any fact herein stated on the ground that such fact is not material or relevant, or is not competent evidence to prove any issue involved.

41 (1). Gustavus F. Swift died testate, a resident of Illinois, on March 29, 1903. His last will and testament was probated on May 2, 1903, in Cook County, Illinois. A true copy of said last will and testament is attached hereto, made a part hereof and marked "Exhibit 1".

(2) Gustavus F. Swift left nine children surviving him, one of whom died on October 19, 1911. The petitioners, George H. Swift, Charles H. Swift, Gustavus F. Swift, Harold R. Swift, Ruth Swift Maguire* and Helen Swift

* Ruth Swift Maguire and her husband, Jeremiah D. Maguire, filed a joint return for the calendar year 1930, and the husband has joined in the petition in docket No. 72216.

Neilson are six of said nine children. Louis F. Swift died May 12, 1937. The petitioners in docket No. 90342, Louis F. Swift, Jr., Gustavus F. Swift and Henry Veeder, are the executors of his estate. Edward F. Swift died May 28, 1932. The petitioners in docket No. 90341, Charles H. Swift, T. Philip Swift and Edward F. Swift, Jr., are the executors of his estate.

(3) On December 11, 1905, the final account of Louis F. Swift, Edward F. Swift and Edward Tilden, as executors of the last will and testament of Gustavus F. Swift, deceased, was presented to and approved by the Probate Court of Cook County, Illinois. Pursuant to order of said Probate Court, entered on December 11, 1905, approving said final account and discharging said executors, a true copy of the pertinent parts of which order is attached hereto, made a part hereof, and marked "Exhibit 2", said executors turned over to themselves, as trustees under said last will and testament of said decedent, in accordance
42 with the provisions thereof, all of the residue of the estate of Gustavus F. Swift then remaining in their hands as such executors. Included in such residue were the following assets, which said executors on December 11, 1905, transferred to themselves as trustees under said last will and testament:

	Number of Shares
Capital Stock	
Union Terminal Railroad Company	2,500
North Kansas City Development Company	333⅓
Union Depot Bridge & Terminal Railway Company (Common)	83⅓
Union Depot Bridge & Terminal Railway Company (Preferred)	5,876⅔
Kansas City Ferry Company	10⅔
Guinotte Land Company	66⅔
Bills Receivable	**Face Value**
Notes of Union Depot Bridge & Terminal Railway Company, dated March 2, 1903, due 6 Months after date, bearing interest at 5 per cent per annum aggregating in face value	$331,147.25
Note of Union Depot Bridge & Terminal Railway Company, dated March 13, 1903, due September 2, 1903, bearing interest at 5 per cent per annum, face value	8,000.00

Upon said notes of Union Depot Bridge & Terminal Railway Company, aggregating $339,147.25 in face value, payment of $113,049.08 principal and $3,827.74 interest was received on November 21, 1903, and said payment so endorsed on said notes.

(4) Said Edward Tilden died on February 5, 1915, and on March 1, 1915, Charles H. Swift was elected and chosen to succeed said Edward Tilden as testamentary trustee by the majority vote of the remaining trustees and the widow and children of said Gustavus F. Swift, pursuant to the terms of clause 9 of said last will and testament.

43 (5) Between December 11, 1905, and March 29, 1923, said testamentary trustees administered said assets so transferred to them, under said last will and testament, as described in paragraph (3) of this stipulation. During said period, said testamentary trustees acquired certain additional assets listed as follows:

	Number of Shares
Common Stock	
Union Terminal Railroad Company	2,500
North Kansas City Land & Improvement Company	600
Parkside Land Company	500
Preferred Stock	
Union Depot Bridge & Terminal Railway Company	666⅔

in consideration for money advanced by said testamentary trustees to the corporations mentioned in the above list. In each case the amount of money advanced was less than the fair market value on March 29, 1923, of said securities so acquired. The fair market value on March 1, 1913, of such of said securities as were issued prior to that date, was less than the fair market value of said securities on March 29, 1923.

(6) On March 29, 1923, said eight surviving children of Gustavus F. Swift joined in forming the Union Terminal Trust by the execution of a written instrument, a copy of which is attached hereto, made a part hereof, and marked "Exhibit 3". By formal instruments executed by the parties to the agreement creating said Union Terminal Trust the life of said Trust was extended to March 29, 1932.

44 (7) On March 29, 1923, said eight surviving children of Gustavus F. Swift joined in forming the Swift Family Realty Trust by the execution of a written instrument, a copy of which is attached hereto, made a part hereof, and marked "Exhibit 4". By formal instruments executed by the parties to the agreement creating said Swift Family Realty Trust the life of said Trust was extended from time to time, and said Trust still exists.

(8) On March 29, 1923, each of the six surviving sons of Gustavus F. Swift executed a written order to said testamentary trustees. A true copy of such order, signed by George H. Swift, is attached hereto, made a part hereof, and marked "Exhibit 5". The other five sons, namely, Louis F. Swift, Edward F. Swift, Charles H. Swift, Gustavus F. Swift and Harold H. Swift, signed identical orders. On March 29, 1923, the two surviving daughters of said Gustavus F. Swift each executed a written order to said testamentary trustees. A true copy of such order, signed by Ruth Swift Maguire, is attached hereto, made a part hereof, and marked "Exhibit 6". Helen Swift Neilson signed an identical order.

(9) On March 29, 1923, each of said eight surviving children of Gustavus F. Swift executed a written acknowledgment of receipt of his (or her) full one-eighth distributive share of the estate of Gustavus F. Swift, deceased. A true copy of such receipt, signed by George H. Swift, is attached hereto, made a part hereof, and marked "Exhibit 7". The other surviving children, namely, Louis P. Swift, Edward F. Swift, Charles H. Swift, Gustavus F. Swift, Harold H. Swift, Ruth Swift Maguire and Helen Swift Neilson signed identical instruments.

45 (10) On March 29, 1923, pursuant to said orders of said eight surviving children of Gustavus F. Swift, said testamentary trustees transferred to Louis F. Swift, Edward F. Swift and Charles H. Swift, as Trustees of said Union Terminal Trust, the following assets:

Common Stock, Union Terminal Railroad Company	5,000 Shares
Accounts Receivable, Union Terminal Railroad Company, Face Value	$964,113.27

(11) On January 2, 1930, said Union Terminal Trust sold said 5,000 shares of the capital stock of Union Terminal Railroad Company and said accounts receivable, due from said Union Terminal Railroad Company, for a total consideration of $4,600,000 in cash or its equivalent.

(12) The fair market value, as of March 1, 1913, of the assets so sold by said Union Terminal Trust on January 2, 1930, adjusted to the date of sale, was $1,164,660.70. The fair market value, as of March 29, 1923, of the assets so sold by said Union Terminal Trust on January 2, 1930, adjusted to the date of sale, was $1,988,863.28. The cost of said assets, adjusted to the date of sale, was $1,212,899.71.

(13) If the basis for determining the profit from the sale of said assets so sold by said Union Terminal Trust be decided by the Board to be the fair market value thereof at March 1, 1913, the Board may find that the profit from such sale is $3,387,100.29, of which sum one-eighth, or $423,387.54, is taxable as capital gain to each petitioner
46 herein in the calendar year 1930.

(14) If the basis for determining the profit from the sale of said assets so sold by said Union Terminal Trust be decided by the Board to be the fair market value thereof at March 29, 1923, the Board may find that the profit from such sale is $2,611,136.72, of which one-eighth, or $326,392.09, is taxable as capital gain to each petitioner herein in the calendar year 1930.

(15) On March 29, 1923, pursuant to said orders mentioned in paragraph (8) above, said testamentary trustees transferred to Louis F. Swift, Edward F. Swift and Charles H. Swift, as Trustees of said Swift Family Realty Trust, the following assets:

Capital Stock	Number of Shares
Union Depot Bridge & Terminal Railway Company (Preferred)	6,543
Union Depot Bridge & Terminal Railway Company (Common)	83-1/3
North Kansas City Development Company	333-1/3
North Kansas City Land & Development Company	600
Parkside Land Company	500
Guinotte Land Company	66-2/3
Kansas City Ferry Company	10-2/3
Notes Receivable	**Face Value**
Union Depot Bridge & Terminal Railway Company	$ 417,314.32
North Kansas City Development Company	1,670,334.83

(16) On November 4, 1929, said Swift Family Realty Trust sold said assets described in paragraph (15) hereof

for a total consideration of $6,500,000.00. Of said con-
47 sideration, the amount of $2,600,000.00 was paid to said Swift Family Realty Trust on November 9, 1929, and the remainder, i. e., $3,900,000.00, was paid to said Trust on October 16, 1930.

(17) Said Swift Family Realty Trust filed a Federal income tax return for the calendar year 1929, reporting the profit from such sale on the installment basis. On said return, 40 per cent of the total profit was stated to be $555,673.00, and was reported as capital gain in the calendar year 1929, and said Swift Family Realty Trust paid the tax thereon.

(18) The assets so sold by said Swift Family Realty Trust constituted a one-third interest in the total outstanding capital stock and outstanding notes of the corporations named in paragraph (15) of this stipulation. As of March 1, 1913, the fair market value of said one-third interest in said outstanding capital stock and outstanding notes of said corporations, adjusted to the date of sale, was $3,221,232.58. As of March 29, 1923, the fair market value of said one-third interest, adjusted to the date of sale, was $4,499,333.00.

(19) The cost of said one-third interest in said capital stock and outstanding notes of said corporations to Gustavus F. Swift, deceased, and to said testamentary trustees was less than the March 1, 1913, value thereof.

(20) During the calendar year 1930, said Swift Family Realty Trust paid a commission of $24,000.00 upon said sale consummated on November 4, 1929. Said Swift Fam-
ily Realty Trust kept its books of account on the cash
48 receipts and disbursements basis during the calendar years 1929 and 1930.

(21) If the basis for determining the profit from the sale of said assets so sold by said Swift Family Realty Trust, as described in paragraph (16) of this stipulation, be decided by the Board to be the fair market value thereof at March 1, 1913, the Board may find that the profit realized in 1930 from such sale is $1,943,260.45, of which one-eighth, or $242,907.56, is taxable to capital gain to each petitioner herein in the calendar year 1930.

(22) If the basis for determining the profit from the sale of said assets so sold by said Swift Family Realty Trust, as described in paragraph (16) of this stipulation, be decided by the Board to be the fair market value thereof at

March 29, 1923, the Board may find that the profit realized in 1930 from such sale is $1,176,400.20, of which one-eighth, or $147,050.02, is taxable as capital gain to each petitioner herein in the calendar year 1930.

(23) Nothing contained in Paragraphs (12), (14), (21) and (22) of this stipulation shall be construed so as to deprive any party of its right to appeal from the decision of the Board.

(Sgd.) Francis E. Baldwin
Counsel for the Petitioners.

(Signed) J. P. Wenchel GWK
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue, Counsel for the Respondent.

49 UNITED STATES BOARD OF TAX APPEALS.

Filed Aug. 24, 1939.

* * * (Caption—72216, 90338-90344) * *

AMENDMENT TO STIPULATION OF FACTS.

Filed Aug. 24, 1939.

It is hereby stipulated by and between the parties hereto that the "Stipulation of Facts" filed in the above proceedings at the hearing on May 17, 1938 is amended as follows:

50 The last sentence of paragraph 12 on page 7 of said stipulation is amended to read as follows:

The cost of said assets to Gustavus F. Swift, deceased, and the fair market value thereof as of December 11, 1905 when received by said testamentary trustees, adjusted to the date of sale, was $1,212,899.71.

That paragraph 13 on page 7 of said stipulation is amended by striking the date "March 1, 1913" appearing in the third line of said paragraph 13 and substituting therefor the date "December 11, 1905."

That paragraph 19 on page 9 of said stipulation is amended to read as follows:

(19) The cost of said one-third interest in said capital stock and outstanding notes of said corporations to Gustavus F. Swift, deceased, and the fair market value thereof as of December 11, 1905, when received by said testament-

ary trustees, were less than the March 1, 1913 value thereof.

(S) J. A. Councilor,
Counsel for Petitioners.
Signed J. P. Wenchel Y
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
Brooks Fullerton,
Special Attorney,
Bureau of Internal Revenue.

51 EXHIBIT 1.

Certified Copies
of
Last Will
and
Testament
of
Gustavus F. Swift,
and
Letters Testamentary.

Will dated March 21st, 1903.

Letters dated May 2d, 1903.

52 I, Gustavus F. Swift, of the City of Chicago, County of Cook and State of Illinois, do hereby make and declare this to be my last will and testament, hereby revoking all former wills by me made.

1. I give, devise and bequeath to my wife, Ann M. Swift, and to her heirs and assigns, forever, the pieces and parcels of land on which I now reside, and all the buildings and improvements thereon situated. The premises are particularly described as follows, to wit:

The south half (½) of lot six (6), all of lot seven (7), and the east fifty (50) feet of the south one hundred and fifty (150) feet of lot eight (8) in the subdivision of block four (4) in Drexel and Smith's subdivision of the west

half (½) of the north-west quarter (¼), and the west half (½) of the west half (½) of the south-west quarter (¼) of section eleven (11), township thirty-eight (38) north, range fourteen (14) east of the third (3rd) principal meridian, in Cook County, Illinois, being one hundred and fifty (150) feet front on Ellis avenue by two hundred and fifty (250) feet on Forty-ninth street, on the north-west corner of said streets.

Also all my household furniture and fixtures, pictures, plate and household stores of every kind. Also all my horses, carriages, harness, cows and other property used at or in connection with said residence.

2. I give, devise and bequeath to my sons, Louis F. Swift and Edward F. Swift, and to my friend, Edward Tilden, as executors and trustees, all the rest and residue of my property of every nature and description and wherever situated, to have and to hold under the following trusts and conditions, viz.:

3. My said executors and trustees may continue all existing business and partnerships in which I may be interested, or settle and discontinue the same, or any of them, at any time when in their judgment it is for the interests of my estate the same should be discontinued; they may improve, lease or sell any of
53 my real estate or personal property and execute deeds of conveyance therefor; they may make investments in real estate or personal property, and change the same in their discretion; they may give and renew notes, execute mortgages, and generally do any and all things necessary to be done in and about the proper and judicious management of my estate and the execution of the trusts herein contained as I could do if living.

4. As soon as the same can be done without prejudice to my estate, may said executors and trustees are directed to pay all my debts, and for this purpose they shall convert into money such real estate or personal property as in their judgment shall be most available for that purpose, and which will least prejudice the management of the estate or the value thereof.

5. My said executors and trustees are hereby directed to pay to my wife, Ann M. Swift, commencing with the date of my decease, and continuing until the final distribution of my estate shall take place under the provisions of this will, or until her death, if she shall die before such distribution, the sum of forty thousand dollars ($40,000) per year, payable in equal monthly install-

ments, for her sole use, the same to be expended according to her sole judgment and discretion.

6. My said executors and trustees are hereby directed to pay to each of my children, commencing with the date of my decease and continuing until the final distribution of my estate shall take place under the provisions of this will, the sum of eight thousand dollars ($8,000) per year, payable in equal monthly installments, for the sole use of each such child. And if any of my children shall have died before my decease, or shall die before said final distribution of my estate, leaving child or children, then such sum shall be paid to the guardian of such child or children for their sole use.

7. When all the debts of my estate which existed at the time of my decease shall have been paid my said
54 trustees are directed to make a first and partial distribution of my estate as follows:

(a) They shall give to each of my brothers and sisters, who shall be living at that time, the sum of five thousand dollars ($5,000) and the same sum to the children, if any, of any deceased brother or sister (provided such deceased brother or sister leaves no wife or husband, as the case may be, surviving), to be divided equally among such children.

(b) They shall set aside as a trust fund for the benefit and use of each surviving wife or husband, as the case may be, of any deceased brother or sister, the sum of five thousand dollars ($5,000), and shall pay the income thereof to such surviving wife or husband during her or his life and after the death of such surviving wife or husband they shall pay said principal sum of the surviving children of my said deceased brother or sister or their descendants per stirpes and not per capita, and if there be no surviving child or children or descendants thereof then such principal sum shall revert to my estate.

(c) They shall give to each of my grandchildren, and to each of my nephews and nieces who shall be living at that time, the sum of one thousand dollars ($1,000), and the same sum to the children, if any, of any deceased grandchild, nephew or niece, to be divided equally among such children.

(d) They shall give to my wife, Ann M. Swift, if living, the sum of two hundred and fifty thousand dollars ($250,000) to be expended by her for charitable purposes in such manner and to such persons or parties as she may see fit. My said wife fully understands my views on this

subject and I desire that the said sum be distributed by her in accordance with her judgment and discretion, and that she be not called upon to render any account for the same.

(e) They shall give to my wife, Ann M. Swift, if living, for her sole use and benefit, the sum of three hundred thousand dollars ($300,000) to be paid to her in stock of Swift and Company and of Swift Refrigerator Transportation Company, at the par value of such stock and in the proportion of four shares of the former to one share of the latter.

(f) They shall give to each of my children who shall have attained their majority, for their respective sole use and benefit, the sum of one hundred thousand dollars ($100,000), and if any of my children shall have died before such payment, leaving children, the same sum shall be paid to the guardian of such children for their use and benefit, said sum to be paid in stock of Swift and Company and of Swift Refrigerator Transportation Company, at the par value of such stock and in the proportion of four shares of the former to one share of the latter.

(g) As each of my other children shall respectively attain their majority, after such first distribution shall have been made as above provided, my executors and trustees are directed to give each such child, for his or her sole use and benefit, the sum of one hundred thousand dollars ($100,000), to be paid in stock of Swift and Company and of Swift Refrigerator Transportation Company, at the par value of such stock and in the proportion of four shares of the former to one share of the latter, and also a sum of money equal to all the earnings of said stock after the date of said first distribution as above provided, and interest at the rate of 6 per cent per annum upon such earnings.

8. My said executors and trustees are directed to make a final distribution of all the rest and residue of my estate among my wife and children, at any time in their judgment and discretion after the expiration of ten (10) years from and after the date of my decease, but not before, and, in any event, not later than twenty (20) years thereafter, giving to my wife the one-third part thereof, the balance to be equally divided among my children, share and share alike, and should my wife not be living

at the time of such distribution, then the same shall
56 be divided equally among my children, share and share alike, the descendants of any deceased children in such distribution to take the proportion of their deceased parent, and in case my executors and trustees are not able to make a fair and equitable distribution of my estate in kind, they shall have power to sell any or all of the real estate or personal property and convert the same into money so that the same shall be fairly and equitably distributed as hereinbefore provided.

9. In the management of my estate and the transaction of any business pertaining thereto the concurrence of two executors and trustees shall be required. In case of the death or refusal to act of any executor or trustee, his successor shall be chosen by the majority vote of the remaining executors and trustees, my wife and adult children, my wife to cast two votes and the others one vote each. The surviving executors and trustees shall have but one vote each whether in the capacity of trustee or heir. Such a selection shall be evidenced by a statement in writing, signed by those casting a majority of the votes entitled to be cast at such election, duly acknowledged and recorded in the office of the recorder of deeds for Cook County, Illinois.

10. My said executors and trustees shall be allowed to charge and receive the sum of three thousand dollars ($3,000) per year each for their services as trustees from the date of my decease until the time of the final distribution of my estate, which shall be in full payment for all their services either as trustees or executors.

11. The provisions of this will in favor of my wife, Ann M. Swift, are intended to be in lieu of dower, widow's award, and all other provisions for the widow made by the laws of Illinois or of the several states where any of my estate, real or personal, may be situate.

12. I hereby appoint my sons, Louis F. Swift and Edward F. Swift, and my friend, Edward Tilden, the
57 executors of this will, and I request that no bonds be required of them either as executors or trustees.

Witness my hand and seal this twenty-first day of March, A. D. 1903.

Gustavus F. Swift. (Seal)

Signed, sealed and declared to be his last will and testament by Gustavus F. Swift in our presence. And we in his presence, and at his request, and in the presence

of each other, have subscribed our names as witnesses thereto this twenty-first day of March, A. D. 1903.

Albert H. Veeder,
4842 Vincennes Ave., Chicago.
Henry Veeder,
4841 Vincennes Ave., Chicago.
Frank Donnelly,
5542 South Park Ave., Chicago.

58 Will approved and admitted to record in open court this second day of May, A. D. 1903.

Charles S. Cutting,
Probate Judge.

State of Illinois, } ss.
County of Cook. }

IN THE PROBATE COURT OF COOK COUNTY.

Proved and admitted to record in open court this 2d day of May, A. D. 1903.

Patrick J. Cahill,
Clerk.

Filed April 8, 1903.

Patrick J. Cahill,
Clerk.

59 State of Illinois, } ss.
County of Cook. }

The People of the State of Illinois,
To all to whom these presents shall come, Greeting:

Know Ye, That whereas Gustavus F. Swift, late of the County of Cook and State of Illinois, died on about the 29th day of March, A. D. 1903, as it is said, after having duly made and published his last will and testament, a copy whereof is hereunto annexed, leaving at the time of his death property in this state, which may be lost, destroyed or diminished in value, if speedy care be not taken of the same; and inasmuch as it appears that Louis F. Swift, Edward F. Swift and Edward Tilden have been appointed executors in and by the said last will and testament, to execute the same, and to the end that the said property may be preserved for those who shall appear to have a legal right or interest therein, and that said will may be executed according to the request of said testator, we do hereby authorize the said Louis F. Swift,

Edward F. Swift and Edward Tilden as such executors to collect and secure all and singular the goods and chattels, rights and credits which were of the said Gustavus F. Swift at the time of his decease in whosesoever hands or possession the same may be found, in this state, and well and truly to perform and fulfill all such duties as may be enjoined upon them by the said will, so far as there shall be property and the law charge them, and in general to do and perform all other acts which now or hereafter may be required of them by law.

Witness, Patrick J. Cahill clerk of the Probate Court, of said County of Cook, and the seal of said court, this 2nd day of May, A. D 1903.

Patrick J. Cahill,
(L. S.) *Clerk.*

60 State of Illinois, } ss.
County of Cook. }

I, Mitchell C. Robin, clerk of the Probate Court of Cook County, in the state aforesaid, do hereby certify that the within is a true and correct copy of the last will and testament of Gustavus F. Swift, deceased, and of letters testamentary issued thereon, on the 2nd day of May, A. D. 1903, to Louis F. Swift, Edward F. Swift and Edward Tilden now in force, as it appears from the originals on file, and from the records of the Probate Court, in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said Probate Court at Chicago, in said County, this 28 day of April, A. D. 1938.

(Sgd.) Mitchell C. Robin,
(Seal) *Clerk.*

61 EXHIBIT 2.

In the Matter of the Estate of
Gustavus F. Swift, Deceased.
Docket 71
Page 156
File 3-7612

This day came Louis F. Swift, Edward F. Swift and Edward Tilden, Executors of the last will and testament of Gustavus F. Swift, deceased, and presented to the court their final account with the Estate of said decedent showing receipts, including the sum of $199,773.46, balance on hand as shown by the first account approved herein, amounting to $2,388,888.46, and disbursements, including the sum of $1,220,000.00 paid to the legatees under the will of said decedent, amounting to $2,211,204.22, leaving a balance on hand amounting to $177,684.24. Said Executors also made part of said final account an itemized list of stocks, bonds and other securities remaining in their hands belonging to said estate.

Said Executors also presented to the court and filed herein due proof of notice of the presentation of said final account to this court to the minor heir at law of
62 said decedent, and the appearance of the adult heirs at law who consent to the approval of said final account and the discharge of said Executors. And the court having examined said final account, and it appearing to the court that certain claims not allowed by this court against said Estate have been paid out of funds belonging to said Estate, and on proof made in open court that they are just claims against said Estate, it is ordered that said payments be allowed. And it further appearing to the court that a widow's award amounting to $40,000.00 has been allowed and approved in said Estate, and it further appearing to the court that under the provisions of the will for the widow of said decedent, a widow's award is barred, and no renunciation of said provisions having been filed by said widow, it is ordered that so much of the order of this court as approves said widow's award be and the same is hereby vacated and set aside, and that said widow's award be and it is hereby disallowed by the court, and it is further ordered that said final account be approved and recorded.

And it now appearing to the court that more than

two years have elapsed since the issues of letters testamentary herein; that all assets of said estate have been collected or accounted for in kind; that all claims allowed by this court against said Estate have been paid; that the claim of Minna Feuerbacher, heretofore disallowed, and upon which an appeal to the Circuit Court was prayed and allowed, has been dismissed in said court, and a transcript of said dismissal has been filed in this court; that all legacies under the will of said dece-
63 dent have been paid, except that of Harold H. Swift, a minor, which is held by said Trustees under said will; that the widow's award allowed in said Estate had been disallowed; that the inheritance tax levied and assessed on said Estate has been paid; that the funeral expenses of said decedent and all costs of administration herein have been paid, it is ordered that the balance of said Estate in cash and in kind, to-wit:

(Here follows a detailed schedule showing, among other assets, the assets described in Paragraph (3) of the stipulation to which this Exhibit is attached.)

be turned over by said Executors to themselves as Trustees under the will of said decedent, in accordance with the provisions of said will.

And it is further ordered that said executors have leave to withdraw all vouchers, same having been filed, with the understanding that they shall be r turned to the files when so ordered by the court.

Now comes Louis F. Swift, Edward F. Swift and Edward Tilden, said Executors, and file their joint receipt as such Trustees for the balance of said Estate in cash and in kind as shown by said final account, whereupon, it is ordered that said Estate be declared settled, and that said executors be and they are hereby discharged.

Entered December 11, 1905.

(Signed) Charles S. Cutting,
Probate Judge.

19 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—72216, 90338-90344) * *

Francis E. Baldwin, Esq., John E. Brown, Esq., and James A. Councilor, C. P. A., for the petitioners.

Brooks Fullerton, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION.

SMITH: These proceedings are for the redetermination of deficiencies in income tax for 1930 as follows:

Docket No.	Petitioner	Deficiency
72216	Jeremiah D. Maguire and Ruth S. Maguire	$71,429.62
90338	Harold H. Swift	82,633.95
90339	Gustavus F. Swift	50,981.70
90340	Charles H. Swift	74,212.41
90341	Charles H. Swift, et al., Executors of Edward F. Swift	88,905.87
90342	Louis F. Swift, Jr., et al., Executors of Louis F. Swift	90,884.49
90343	Helen Swift Neilson	86,840.59
90344	George H. Swift	78,163.28

The principal issue involved, which is common to all of the proceedings, is the determination of the taxpayers' gain in 1930 or, more specifically, the basis to be used in computing the taxable gain, from the sale by the taxpayers trustees of certain assets which were distributed to the taxpayers by the testamentary trustees of the residuary estate of taxpayers' father, Gustavus F. Swift. The petitioners admit that they are liable to income tax on all of such gains. All of the essential facts pertaining to this issue have been stipulated.

A further issue, which involves the petitioner Helen Swift Neilson, Docket No. 90343 only, is whether that petitioner sustained a deductible loss in 1930 on account of the capital stock of the Package Car Corporation becoming worthless in that year. A separate stipulation of facts and separate briefs have been submitted in respect of the latter issue.

Other issues raised in the petitions and answers have either been settled by stipulation or withdrawn and will be disposed of accordingly under Rule 50 settlement.

Owing to the unrelated nature of the issues to be determined they will be discussed separately.

20. *Gain on sale of assets acquired from trustees of residuary estate of Gustavus F. Swift.*

The evidentiary or primary facts pertaining to this issue are summarized in substantially the same manner in the briefs submitted by the petitioners and the respondent. In their reply brief the petitioners state:

> * * * Petitioners have no objection to the finding of the primary facts requested, but object to the finding of the ultimate facts requested by Respondent.

The respondent's requested findings of primary facts to which the petitioners thus agree read as follows:

Findings of Fact.

(1) Gustavus F. Swift died testate, a resident of Illinois, on March 29, 1903. He left nine children surviving him, one of whom died on October 19, 1911. The petitioners in these proceedings (or the petitioners' decedents) are the eight children of Gustavus F. Swift surviving on March 1, 1913, and also on March 29, 1923. Ann M. Swift, the wife of Gustavus F. Swift, died on May 19, 1922.

(2) The last will and testament of Gustavus F. Swift was probated on May 2, 1903, in Cook County, Illinois. Said last will and testament, after making certain specific bequests, devised and bequeathed to Louis F. Swift, Edward F. Swift and Edward Tilden, as executors and trustees, the residue of decedent's estate. It directed said executors and trustees to pay all debts, to make certain payments annually commencing with the date of the testator's decease and continuing until the final distribution of the estate, to make certain partial distributions after the payment of all debts had been completed, and, by clause 8 of said will, directed said executors and trustees

> "to make a final distribution of all the rest and residue of my estate among my wife and children, at any time in their judgment and discretion after the expiration of ten (10) years from and after the date of my decease, but not before, and, in any event, not later than twenty (20) years thereafter, giving to my wife the one-third part thereof, the balance to be equally divided among my children, share and share alike, and should my wife not be living at the time of such distribution, then the same shall be divided

equally among my children, share and share alike, the descendants of any deceased children in such distribution to take the proportion of their deceased parent, * * *."

(3) On December 11, 1905, the final account of the executors of said last will and testament was presented to and approved by the Probate Court of Cook County, Illinois. Pursuant to order of said Probate Court, entered on December 11, 1905, approving the final account and discharging said executors, said executors turned over to themselves, as trustees under said last will and testament, all of the residue of the estate of Gustavus F. Swift. Included in such residue were the following assets, which said executors on December 11, 1905, transferred to themselves as trustees under said last will and testament:

	Number of Shares
Capital Stock	
Union Terminal Railroad Company	2,500
North Kansas City Development Company	333⅓
Union Depot Bridge & Terminal Railway Company (Common)	83⅓
Union Depot Bridge & Terminal Railway Company (Preferred)	5,876⅔
Kansas City Ferry Company	10⅔
Guinotte Land Company	66⅔
	Face Value
Bills Receivable	
Notes of Union Depot Bridge & Terminal Railway Company, dated March 2, 1903, due 6 months after date, bearing interest at 5 per cent per annum aggregating in face value	$331,147.25
Note of Union Depot Bridge & Terminal Railway Company, dated March 13, 1903, due September 2, 1903, bearing interest at 5 per cent per annum, face value	8,000.00

Upon said notes of Union Depot Bridge and Terminal Railway Company, aggregating $339,147.25 in face value, payment of $113,049.08 principal and $3,827.74 interest was received on November 21, 1903, and said payment so endorsed on said notes.

(4) Between December 11, 1905, and March 29, 1923, said testamentary trustees administered said assets so transferred to them, under said last will and testament, as described in paragraph (3) of this stipulation. During said period, said testamentary trustees acquired certain additional assets listed as follows:

	Number of Shares
Common Stock	
Union Terminal Railroad Company	2,500
North Kansas City Land & Improvement Company	600
Parkside Land Company	500
Preferred Stock	
Union Depot Bridge & Terminal Railway Company	666⅔

in consideration for money advanced by said testamentary trustees to the corporations mentioned in the above list. In each case the amount of money advanced was less than the fair market value on March 29, 1923, of said securities so acquired. The fair market value on March 1, 1913, of such of said securities as were issued prior to that date, was less than the fair market value of said securities on March 29, 1923.

(5) Pursuant to the requirement of clause 8 of said last will and testament, said testamentary trustees, on March 29, 1923, made a distribution of the assets then held by said trustees to the eight children of the testator surviving on that date. Included in such assets were the following assets which were so distributed to the petitioners (or petitioners' decedents) in these proceedings:

Common Stock, Union Terminal Railroad Company	5,000 shares
Accounts Receivable, Union Terminal Railroad Company—Face Value	$964,113.27

Said assets so distributed were transferred by the petitioners (or petitioners' decedents) to trustees of Union Terminal Trust on March 29, 1923, and held by said trustees until, on January 2, 1930, said assets were sold for a total consideration of $4,600,000.00.

(6) Included in the assets so distributed to the petitioners (or petitioners' decedents) in these proceedings on March 29, 1923, were the following assets:

Capital Stock:		
Union Depot Bridge & Terminal Railway Company (Preferred)	6,543	Shares
Union Depot Bridge & Terminal Railway Company (Common)	68-1/2	Shares
North Kansas City Development Company	333-1/3	Shares
North Kansas City Land & Improvement Company	600	Shares
Parkside Land Company	500	Shares
Guinotte Land Company	66-2/3	Shares
Kansas City Ferry Company	10-2/3	Shares
Notes Receivable:		
Union Depot Bridge & Terminal Railway Company—Face Value	$417,314.32	
North Kansas City Development Company—Face Value	1,670,334.83	

(7) Said assets so distributed were transferred by the petitioners (or petitioners' decedents) to trustees of Swift Family Realty Trust on March 29, 1923, and held by said trustees until, on November 4, 1929, said assets were sold for a total consideration of $6,500,000.00, of which $2,600,000.00 was paid on November 9, 1929, and $3,900,000.00 was paid on October 16, 1930.

(8) The fair market value, as of March 1, 1913, of the assets so sold by said Union Terminal Trust on January 2, 1930, adjusted to the date of sale, was $1,164,660.70. The fair market value, as of March 29, 1923, of said assets, adjusted to the date of sale, was $1,988,863.28. The fair market value of said assets as of December 11, 1905 when received by said testamentary trustees, adjusted to the date of sale was $1,212,899.71.

(9) The fair market value, as of March 1, 1913, of the assets so sold by said Swift Family Realty Trust on November 4, 1929, adjusted to the date of sale, was $3,221,232.58. The fair market value, as of March 29, 1923, of said assets, adjusted to the date of sale, was $4,499,332.00. The fair market value of said assets as of December 11, 1905 when received by said testamentary trustees was less than the March 1, 1913 value thereof.

(10) The trustees of Union Terminal Trust and the trustees of the Swift Family Realty Trust reported and paid tax on the gain which each group of trustees believed to be due on the sales here involved. Timely claims were

filed and are still pending for refund of all taxes paid by both groups of trustees for the year 1930. The trustees of the Swift Family Realty Trust filed no claim for refund of tax paid on the gain reported for 1929. No one of the petitioners in his income tax return filed for 1929 or for 1930 reported, or paid any tax in respect of, gain on the sales here involved.

22 The Board also makes the following findings:

11. In its income tax return for 1929 the Swift Family Realty Trust reported in its income for that year 40 per cent of the net gain realized from the sale on November 4, 1929, of the assets which were sold for a total consideration of $6,500,000, the 40 per cent representing that percentage of the consideration received in 1929. In its income tax return for 1930 the Swift Family Realty Trust reported 60 per cent of the capital net gain from the sale, that percentage representing the total part of the consideration received in 1930.

12. "During the calendar year 1930, said Swift Family Realty Trust paid a commission of $24,000 upon said sale consummated on November 4, 1929. Said Swift Family Realty Trust kept its books of account on the cash receipts and disbursements basis during the calendar years 1929 and 1930." (Paragraph (20) of stipulation of facts.)

13. "If the basis for determining the profit from the sale of said assets so sold by said Union Terminal Trust be decided by the Board to be the fair market value thereof at March 29, 1923, the Board may find that the profit from such sale is $2,611,136.72, of which one-eighth, or $326,392.09, is taxable as capital gain to each petitioner herein in the calendar year 1930." (Paragraph (14) of stipulation of facts.)

14. "If the basis for determining the profit from the sale of said assets so sold by said Swift Family Realty Trust, as described in paragraph (16) of this stipulation, be decided by the Board to be the fair market value thereof at March 29, 1923, the Board may find that the profit realized in 1930 from such sale is $1,176,400.20, of which one-eighth, or $147,050.02, is taxable as capital gain to each petitioner herein in the calendar year 1930." (Paragraph (22) of stipulation of facts.)

OPINION.

Although the Union Terminal Trust and the Swift Family Realty Trust returned as taxable income the capital gains realized by those trusts in 1930 the petitioners now admit that they are taxable upon the capital gains realized by the trusts in 1930 which is in accordance with the determination of the respondent. Each petitioner is, therefore, taxable upon one-eighth of the total capital gain realized by the trusts in 1930.

The only question presented to the Board for decision upon the main issue is whether the basis for computing the gain from the sale of the assets by the trusts is the fair market value of the assets on March 29, 1923, when the assets were distributed by the testamentary trustees to the beneficiaries, the taxpayers herein, as claimed by the petitioners, or the fair market value of the assets on December 11, 1905, when the assets were delivered by the executors to themselves as trustees, or the March 1, 1913, value of the assets, whichever is greater, as contended by the respondent.

Section 113 (a) (5) of the Revenue Act of 1928 reads as follows:

> Basis For Determining Gain Or Loss.
>
> (a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—
>
> * * * * * *
>
> (5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or

upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death.

The property here in question consisting of shares of capital stock of corporations and notes and accounts receivable was personal property acquired by the taxpayers by a general devise, not by "specific bequest," under the will of their father and the basis prescribed by the statute is "the fair market value of the property at the time of the distribution to the taxpayer." The difference between the petitioners and the respondent is "the time of distribution" to the taxpayers of their interests in the residuary estate of their father.

The respondent points to the fact that during the period when the residuary estate of Gustavus F. Swift was held by the testamentary trustees from December 11, 1905, to March 29, 1923, there was an increase in the value of the trust assets and that the testamentary trustees acquired additional assets during that period. He argues that to the extent that there was an increase in the value of the residuary estate during the period that it was held by the testamentary trustees such increase in value entirely escapes income tax if the value at March 29, 1923, is used as the basis. He submits that this was not the intention of Congress when it incorporated into the Revenue Act of 1928 section 113 (a) (5).

The language of the statute above quoted, however, is clear and unambiguous. The basis laid down by the statute is "the fair market value of the property at the time of the distribution to the taxpayer." The respondent submits that the executors distributed the assets of the estate to the testamentary trustees on December 11, 1905, and that that distribution was the distribution referred to by the statute. The law says, however, "distribution to the taxpayer." The testamentary trust was not the taxpayer. The taxpayers are the petitioners herein, or their decedents, to whom the assets were distributed by the testamentary trustees on March 29, 1923.

The question as to when the distribution of property takes place under facts similar to those here involved has been considered by the Board and the courts in a number of

cases. In *Ralph W. Harbison*, 26 B. T. A. 896 (reversed on another point in *Harbison* v. *Commissioner*, 68 Fed. (2d) 1004), on facts not materially different from those in the instant case, we held, after reviewing the legislative history of section 113 (a) (5) of the 1926 Act and the decision of the Supreme Court in *Brewster* v. *Gage*, 280 U. S. 327, that the time of distribution to the taxpayers and therefore the basic valuation date under the statute was the date on which the property was distributed to them upon the termination of the testamentary trust created by the will of their father and not the March 17, 1913, value as the Commissioner contended. To the same effect is *Arthur E. Braun, Trustee*, 29 B. T. A. 1161; *Harwood Robbins*, 33 B. T. A. 880; *Robert A. Taft, Trustee*, 34 B. T. A. 603; affd., *Commissioner* v. *Taft* (C. C. A., 6th Cir.), ... Fed. (2d) ....., decided January 10, 1939; *Margaret E. B. Fleming*, 36 B. T. A. 773; *Haskell* v. *Commissioner*, 78 Fed. (2d) 869; certiorari denied, 296 U. S. 652; *Van Nostrand* v. *United States*, 18 F. Supp. 295; affd., 94 Fed. (2d) 510; *Commissioner* v. *Libbey* (C. C. A., 1st Cir.), ... Fed. (2d) ....., decided December 28, 1938. In *Harwood Robbins, supra*, we said:

> The phrase "the time of the distribution" as used in the 1928 Act must necessarily relate to the time at which the property is actually delivered to or made available for the use of the distributee or someone acting for him by the executors, administrators, or others having lawful possession or control thereof. • • •

24 In *Commissioner* v. *Libbey, supra*, the court held that the basis for computing gain or loss on the sale in 1932 of shares of stock distributed to the taxpayer in 1921, by trustees of her father's estate, was the value of the shares of stock at the time of the actual distribution to the taxpayer in 1921. Respondent states in his brief in these proceedings that the *Libbey* case is not distinguishable from the case at bar.

Upon authority of the cited cases we hold that the time of the distribution to the taxpayers of the property which they acquired from the residuary trust estate created by the will of their father was the time at which it was distributed to them by the testamentary trustees upon termination of the trust estate on March 29, 1923. The contentions of the petitioners on this issue are therefore sustained and the tax liabilities as to petitioners' gain on the sale of these assets will be redetermined in accordance with the stipulation as to the value of such assets on the basic date.

Loss on stock of Package Car Corporation.

As stated above, this issue is involved in only one of the above proceedings, that of Helen Swift Neilson, Docket No. 90343. The term petitioner as hereinafter used will refer to Helen Swift Neilson.

The evidentiary facts pertaining to this issue have also been stipulated and the findings of facts requested in the briefs of petitioner and respondent, except for requests for ultimate facts, differ only in minor respects.

FINDINGS OF FACT.

On her income tax return for the calendar year 1930 the petitioner deducted as a loss $11,875 representing the cost of 475 shares of common stock and 95 shares of 7 percent preferred stock of Package Car Corporation which she had acquired on April 28, 1927. In determining the deficiency herein the respondent disallowed the deduction on the ground that the stock of the Package Car Corporation was worthless as of December 31, 1928.

The Package Car Corporation was incorporated as "The Pac-Age-Kar Corporation" on May 1, 1925, under the laws of the State of Illinois. The name was changed in 1927 to "Package Car Corporation." The corporation was organized to engage in the business of designing, developing, manufacturing, and selling a novel and improved type of automotive trucks for the transportation and delivery of package merchandise.

At or about the time of its organization the corporation acquired a sub-license under certain patents, covering certain improvements in motor vehicles, an internal combustion motor, a steering mechanism, and a transmission and locking mechanism. The development of the proposed automotive truck under the sub-licenses referred to was never successful. Such sales of trucks as were made were on an experimental basis and the corporation lost money from its inception.

On October 21, 1926, the corporation entered into a contract with the Mechanical Manufacturing Company of Chicago, Illinois, hereinafter referred to as the Manufacturing Company, to manufacture and assemble all mechanical parts of the motors for its trucks on a cost plus basis. The Package Car Corporation was never able to meet its obligations under this contract. On March 21, 1927, it entered into two new contracts with the Manufacturing Company whereby, under one of such contracts, the Manufacturing

Company agreed to manufacture for the Package Car
25 Corporation all other parts of the trucks, that is, all parts in addition to the motor parts which it was already manufacturing, and, under the other, the Package Car Corporation issued to the Manufacturing Company 18,437 shares of its own stock. The last mentioned contract recites that—

Now, Therefore, in consideration of and as one of the chief inducements to Mechanical Manufacturing Company to enter into and sign the above mentioned contract of even date herewith, and in settlement of second party's above mentioned claim for damages arising out of the breach of the first party of the above mentioned contract dated the 21st day of October, A. D. 1926, first party hereby agrees to issue to said second party Eighteen Thousand Four Hundred Thirty-seven (18,437) shares of the common stock of the Pac-Age-Kar Corporation fully paid and nonassessable.

The Package Car Corporation was never able to meet its obligations under its contracts with the Manufacturing Company and at all times during the years 1928 and 1929, because of such defaults, the contracts were subject to cancellation on 15 days' notice by the Manufacturing Company.

At December 31, 1928, the Package Car Corporation was indebted to the Manufacturing Company for monies advanced to it in the aggregate amount of $507,634.86. Its balance sheet as of that date showed the following assets and liabilities:

Assets.

Cash and Accounts Receivable		$ 12,861.20
Inventories:		
Materials	$ 16,062.77	
Unexpired Insurance	658.58	16,721.35
Fixed Assets:		
Patterns, Jigs, Dies and Fixtures	$169,420.60	
Display Cars	7,912.33	
	$177,332.93	
Less Depreciation	149,435.67	27,897.26
Mechanical Manufacturing Company Contract		92,185.00
Total Assets		$149,664.81

Liabilities.

Accounts Payable:		
Due Mechanical Manufacturing Company	$507,634.86	
Miscellaneous	4,165.37	$511,800.23
Capital Issued:		
Preferred	$157,600.00	
Common	171,585.00	329,185.00
Total Liabilities		$840,985.23
Deficit		691,320.42
		$149,664.81

During the calendar year 1929 the Manufacturing Company advanced further amounts to the Package Car Corporation as follows:

January	$ 5,000.00	
February	6,000.00	
March	14,500.00	
April	2,700.00	
May	2,800.00	
June	18,800.00	
July	2,400.00	
August	28,000.00	
September	11,800.00	
October	150.00	
November	18,070.00	$110,220.00

The Package Car Corporation's balance sheet as of December 31, 1929, was as follows:

Assets.

Current Assets:		
Accounts Receivable — Customers	$ 568.10	
Cash in Bank	796.69	
Prepaid Insurance	228.24	$ 1,593.03
Fixed Assets:		
Office Furniture and Fixtures	$ 1,115.30	
Automobiles	100.00	
	$ 1,215.30	
Less Depreciation	298.24	917.06
Mechanical Manufacturing Company Contract		92,185.00
Total Assets		$94,695.09

26 Liabilities.

Current Liabilities:		
Accounts Payable	$ 2,130.00	
Notes Payable Mechanical Manufacturing Company	616,784.31	$618,914.31
Capital Stock:		
Preferred	$157,600.00	
Common	171,585.00	329,185.00
Deficit		(853,404.22)
Total Liabilities		$ 94,695.09

An annual meeting of the stockholders of the Package Car Corporation was held on January 30, 1930, directors were elected for the ensuing year, and a report from the president of the corporation was read, which stated after reviewing the unsuccessful history of the company:

In addition to above advanced by Mechanical Manufac-

turing Company [the amount of $730,953.31], that Company is carrying on its books, chargeable to your Company, the following items:

Semi-finished Materials	$124,692.00
Undistributed Overhead	176,089.00
Total	$300,781.00

The Mechanical Manufacturing Company has informed us that your Company cannot look to them for further funds or credit, and the questions before this meeting are:

(a) Shall we salvage as much as possible and liquidate the Company? or

(b) Shall we attempt to re-finance and endeavor to find some means of raising funds which will permit completion of the development work necessary to make the package car a commercial success, and, if so, how shall this be done?

A special committee was appointed to make investigations and work out some plan of procedure.

At a special meeting of the stockholders held June 26, 1930, the special committee appointed at the regular stockholders' meeting of January 30, 1930, reported that it had no suggestions to make. The president stated that the company was insolvent and might as well be dissolved and a resolution to dissolve was offered and adopted. The dissolution of the corporation was completed during the calendar year 1930.

In her income tax returns for 1928 and 1929 the petitioner, Helen Swift Neilson, reported net losses for the respective years of $263,935.72 and $204,714.22 and her returns were accepted without change by the Commissioner.

The capital stock of the Package Car Corporation was worthless at December 31, 1929.

OPINION.

It is the respondent's contention that the capital stock of the Package Car Corporation became worthless in a year prior to the taxable year 1930. In his deficiency notice he determined that it was worthless at December 31, 1928.

The statute permits the deduction of losses sustained during the taxable year and not compensated for by insurance or otherwise if incurred in trade or business, or in any transaction entered into for profit. See section 23 (e) (1) and (2) of the Revenue Act of 1928. Article 174 of Regulations 74 provides that no deductible loss results from the mere shrinkage in value of stock but "if stock of a corporation becomes worthless, its cost or other basis determined under section 113 may be deducted by the owner in the taxable year in which the stock became worthless, provided a satisfactory showing of its worthlessness be made, as in the case of bad debts."

If the stock of the Package Car Corporation did not become worthless during the year 1930 then the loss to the petitioner of her investment in it was not *sustained* during that taxable year and is not deductible under the statute. The deduction must be taken in the year during
27 which the stock became worthless. *De Loss* v. *Commissioner*, 28 Fed. (2d) 803; certiorari denied, 279 U. S. 840; *Jessie S. Meachem*, 22 B. T. A. 1091; *Harry C. Kayser*, 27 B. T. A. 816; *Walter E. Kramer, Executor*, 27 B. T. A. 1043; *Claude D. Cass*, 32 B. T. A. 713; affd., 83 Fed. (2d) 841; *Sol H. Goldberg*, 36 B. T. A. 44. Our question, then, is, did the stock of the Package Car Corporation become worthless during the year 1930? We think that it did not. The evidence of record shows beyond doubt that the stock was worthless long prior to December 31, 1929. Whether it became worthless during 1929 or 1928 or in a prior year we do not need to determine, since only the year 1930 is before us in this proceeding. The evidence is that at the close of 1929 the corporation's assets, other than the contract with the Manufacturing Company, were listed in its balance sheet as of December 31st of that year at a value of only $2,510.09, while the outstanding notes payable to the Manufacturing Company amounted to over $616,000. Although the contract referred to was listed in the balance sheet at a value of $92,185, there is no evidence that it had an actual value of that amount or of any other amount. Since at all times during 1928 and 1929, as it is stipulated, the corporation was in default under its contracts with the Manufacturing Company and the contracts were subject to cancellation on 15 days' notice by the Manufacturing Company, it is not likely that they had any value whatever at the close of 1929.

We are not unmindful that the Package Car Corporation was in an experimental or development stage during its entire existence. Under such circumstances ample time should be allowed for the undertaking to materialize before the stock is deemed to be worthless. As long as the directors and stockholders have any reasonable hope or expectation of ultimate success and business operations are continued with that in view the capital stock of the corporation should not be said to be worthless merely because the liabilities exceed the assets. Apparently, though, the business undertaken by the Package Car Corporation had failed beyond question by the close of 1929. After four years of unsuccessful effort the company was hopelessly insolvent and was being financed by its chief creditor, the Manufacturing Company. Apparently it was in November or December, 1929, that the Manufacturing Company itself abandoned hope and withdrew its financial support. It made no further advances to the corporation after November, 1929. The evidence before us suggests no reason for expectation that the condition of the corporation would ever improve after the close of 1929. So far as is shown there were no outstanding orders to be filled and no prospect of new business.

Petitioner makes the argument on brief that the withdrawal of credit by the Manufacturing Company was the "identifiable event" which fixed the loss, and that since this circumstance was not "brought to the petitioner's knowledge" until some time during the taxable year 1930 she is entitled to deduct her loss in that year. This contention is contrary to the rule above stated that the loss must be taken in the year when the stock becomes worthless. We said in *S. G. Armstrong,* 24 B. T. A. 321:

> * * * The ascertainment of a loss within a taxable year is not the criterion imposed by the statute for a loss deduction. Such deductions are allowable only in the year in which the loss is sustained. See *Lemuel S. McLeod,* 19 B. T. A. 134. Cf. *F. W. Darling,* 19 B. T. A. 337; affd., 49 Fed. (2d) 111; certiorari denied, 283 U. S. 866; *Edward H. R. Green,* 19 B. T. A. 904; *Leigh Carroll,* 20 B. T. A. 1029; *Lucas* v. *American Code Co.,* 280 U. S. 445. There is nothing to show that the petitioner did not sustain the loss in question prior to the taxable year before us, and upon this consideration of the claimed deduction we must approve the respondent's disallowance of same.

28 Respondent suggests that the failure of the petitioner to take the loss deduction in one of the prior years, 1928 or 1929, may be due to the fact that she reported in her returns large net losses for both those years without the benefit of such deduction. However that may be, we think that the evidence here amply supports the respondent's determination that the shares of stock in question did not become worthless during 1930 and that the loss was therefore not sustained in that year. On this issue the respondent is sustained.

Judgments will be entered under Rule 50.

Enter:

Entered Jan. 28, 1939.

29 UNITED STATES BOARD OF TAX APPEALS. Entered Mar. 29, 1939.

* * (Caption—72216) * *

DECISION.

Pursuant to the Memorandum Findings of Fact and Opinion of the Board entered February 28, 1939, the respondent herein having on March 21, 1939, filed a recomputation and the petitioner having on March 27, 1939, filed an acquiescence therein, now therefore, it is

Ordered and Decided: That there is a deficiency in income tax for the year 1930 in the amount of $46,443.60.

Enter:

(Signed) Charles P. Smith,
Member.

Entered Mar 29 1939.

30 UNITED STATES BOARD OF TAX APPEALS. Filed June 21, 1939.

* * (Caption—72216) * *

STIPULATION OF VENUE.

Filed June 21, 1939.

Pursuant to the provisions of Section 1002 of the Revenue Act of 1926, as amended by Section 519 of the Revenue Act of 1934, it is hereby agreed and stipulated that the decision of the United States Board of Tax Appeals

in this proceeding may be reviewed by the United States Circuit Court of Appeals for the Seventh Circuit.

(Signed) James W. Morris,
Assistant Attorney General.
(Signed) J. P. Wenchel,
RLW
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.
(Signed) Francis E. Baldwin,
Attorney for Respondents on Review.

Filed June 21, 1939.

31 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Guy T. Helvering, Commissioner of Internal Revenue, *Petitioner on Review,* *vs.* Jeremiah D. Maguire and Ruth S. Maguire, *Respondents on Review.*	B. T. A. Docket No. 72216.

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, James W. Morris, Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Charles E. Lowery, Special Attorney, Bureau of Internal Revenue, and respectfully show:

I.

Jurisdiction.

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States; that the respondents on review, Jeremiah D. Maguire and Ruth S. Maguire (hereinafter referred to as the tax-

payers), are citizens of the United States and residents of New York, New York. The taxpayers filed their joint Federal income tax return for the taxable year 1930 with the Collector of Internal Revenue for the Third New York District, whose office is located in the City of New York, New York, and within the judicial circuit of the United
32 States Circuit Court of Appeals for the Second Circuit. By a stipulation signed by the parties and filed with the United States Board of Tax Appeals, it has been agreed that the decision of the said Board in this proceeding may be reviewed by the United States Circuit Court of Appeals for the Seventh Circuit.

The Commissioner files this petition pursuant to the provisions of Section 1002 of the Revenue Act of 1926, as amended by Section 519 of the Revenue Act of 1934.

II.

Prior Proceedings.

On March 13, 1933, the Commissioner determined a deficiency in Federal income tax against the taxpayers for the year 1930 in the amount of $71,429.62, and sent to the taxpayers, by registered mail, a notice of said deficiency in accordance with the provisions of Section 272 of the Revenue Act of 1928. Thereafter and on May 11, 1933, the taxpayers filed an appeal from the said determination of the Commissioner with the United States Board of Tax Appeals.

The case was duly tried to the United States Board of Tax Appeals and on February 28, 1939, the Board entered its memorandum findings of fact and opinion, pursuant to which opinion decision was entered on March 29, 1939, wherein and whereby it was ordered and decided that there is a deficiency in income tax for the year 1930 in the amount of $46,443.60.

III.

Nature of Controversy.

The question involved in this petition for review has to do with the taxable gain realized by the taxpayers in
33 1930 as the result of the sale by trustees of certain assets that were distributed to the children (of whom Ruth S. Maguire is one) of Gustavus F. Swift, deceased, by testamentary trustees of his residuary estate. Briefly stated the facts are as follows:

Gustavus F. Swift died testate in 1903. By his will he

left a residuary estate in trust for his wife and children to "be divided equally" among his children should his "wife not be living at the time of such distribution". The residuary estate was turned over to the testamentary trustees by the executors on December 11, 1905, after appropriate discharge of the executors by the Probate Court. From the latter date until March 29, 1923, the testamentary trustees administered the assets of the trust and on the latter date distributed the trust corpora to the eight children of the testator who then survived. On the latter date (March 29, 1923) the beneficiaries of the said testamentary trust in turn transferred certain of the assets so received by them to two trusts (Union Terminal Trust and Swift Family Realty Trust). The assets transferred to the Union Terminal Trust were sold on January 2, 1930, for $4,600,000.00 and the assets transferred to the Swift Family Realty Trust were sold on November 4, 1929, for $6,500,000.00, of which latter amount $2,600,000.00 was paid on November 9, 1929, and $3,900,000.00 was paid on October 16, 1930. The gains arising from these sales, as determined by the respective trustees, were reported and taxes were paid thereon by the trustees, whereas no one of the individual beneficiaries returned in his (or her) income tax return any portion of the gain so derived. The taxpayers now concede, however, that they are taxable on the capital gain realized "if
34 the basis for determining the profit from the sale of said assets so sold * * * be the fair market value thereof at March 29, 1923" the date on which it was claimed by them that distribution occurred within the meaning of the statute (Sec. 113(a)(5) of the Revenue Act of 1928). The values of the involved assets on all material dates were stipulated by the parties.

The Commissioner determined that the date of distribution was December 11, 1905, when the executors turned over to themselves, as testamentary trustees, all of the residue of the estate of Gustavus F. Swift, deceased. The Board of Tax Appeals agreed with the taxpayers' contention that the date of "distribution to the taxpayer" was March 29, 1923, when the assets were distributed by the testamentary trustees to the beneficiaries.

IV.

Assignments of Error.

The Commissioner avers that in the record and proceedings before the United States Board of Tax Appeals and

in the opinion and final decision rendered and entered by the United States Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors and each of them, which he avers occurred in said record, proceedings, opinion, and final decision so rendered and entered by the United States Board of Tax Appeals:

1. The United States Board of Tax Appeals erred in ordering and deciding that there is a deficiency in income tax for the year 1930 in the amount of only $46,443.60.

2. The United States Board of Tax Appeals erred in holding that the date of distribution to the residuary
35 legatees of the residue of the estate of Gustavus F. Swift, deceased, was the date, namely, March 29, 1923, when the said property was transferred to the residuary legatees upon the termination of the testamentary trust created by the will of said Gustavus F. Swift, deceased.

3. The United States Board of Tax Appeals erred in failing to hold that the date of distribution to the residuary legatees of the residue of the estate of Gustavus F. Swift, deceased, was the date, namely, December 11, 1905, upon which the executors transferred said residue to themselves as testamentary trustees.

4. The United States Board of Tax Appeals erred in that its decision is not supported by the evidence and is contrary to the law.

Wherefore, the Commissioner petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Seventh Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd.) James W. Morris,
Assistant Attorney General.
(Sgd.) J. P. Wenchel,
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
Charles E. Lowery,
Special Attorney, Bureau of Internal Revenue.

36 United States of America
District of Columbia } ss.

Charles E. Lowery, being duly sworn, says that he is a Special Attorney in the Bureau of Internal Revenue and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd.) Charles E. Lowery,

Sworn and subscribed to before me this 20th day of June, 1939.

(Sgd.) H. B. Linton,
Notary Public.

My commission expires April 1, 1942.

37 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—72216) * *

Filed Jul. 1, 1939.

To: Francis E. Baldwin, Esq.,
33 South Clark Street,
Chicago, Illinois.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of June, 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 21st day of June, 1939.

(Signed) J. P. Wenchel,
RLW
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assign-

ments of error mentioned therein, is hereby acknowledged this 26th day of June, 1939.

(S) Francis E. Baldwin,
Attorney for Respondent on Review.

38 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—72216) * *

NOTICE OF FILING PETITION FOR REVIEW.

Filed Jul. 6, 1939.

To: Mr. Jeremiah D. Maguire,
Mrs. Ruth S. Maguire,
990 5th Avenue,
New York, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of June, 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 21st day of June, 1939.

(Signed) J. P. Wenchel,
RLW
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 23 day of June, 1939.

(S) Jeremiah D. Maguire,
(S) James A. Councilor (?)
Respondents on Review.

Filed July 22, 1939. 68 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

(Caption—72216)

PRAECIPE FOR RECORD.

Filed Jul. 22, 1939.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Court of Appeals for the Seventh Circuit heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of proceedings before the Board.
2. Pleadings before the Board,
(a) Petition, including annexed copy of deficiency letter.
(b) Answer and amendment to answer.
3. Findings of fact, opinion and decision of the Board.
4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
5. Stipulation of venue.
6. Stipulation of Facts (original and supplemental), including Exhibit 1 (will of decedent) and Exhibit 2 (order of Probate Court) attached thereto.
7. Certified copy of order of Court dated July 7, 1939.
8. This praecipe.

(Signed) J. P. Wenchel,
RLW
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

Statement of Service:

A copy of this praecipe was mailed to attorney for respondents on review this date, July 22, 1939.

J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 25th day of July, 1939.

(s) Francis E. Baldwin,
Attorney for Respondents on Review.

64 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * * (Caption—72216, 90338-90344) * *

Filed July 14, 1939.

65 ORDER.

Upon reading and considering the Joint Motion filed and submitted by the attorney for the petitioner and the attorney for the respondents in the above-entitled cases:

It Is Ordered:

1. That a complete record in the case of Guy T. Helvering, Commissioner of Internal Revenue, Petitioner on Review, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents on Review, be transmitted and delivered to the Clerk of this Court by the Clerk of the United States Board of Tax Appeals, said record to consist of copies of the docket entries of proceedings before the Board, petition to the Board, the answer of the respondent, the stipulation of facts, the findings of fact and opinion of the Board, the final order or decision of the Board, the petition for review by this Court and proof of service of a copy thereof with notice of filing on the respondents, duly certified as correct.

2. That in each of the other of the above-entitled cases the Clerk of the United States Board of Tax Appeals shall transmit and deliver to the Clerk of this Court only copies, duly certified, of the final order or decision of the Board and the petition for review by this Court, together with proof of service of a copy thereof and notice of the filing of the same upon the respondent or respondents.

3. That the record in the case of Guy T. Helvering, Commissioner of Internal Revenue, Petitioner on Review, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents on Review, to the extent material shall be used in this Court as the record on review in all eight of the above-entitled cases; the record in the said Maguire case only to be printed, and the said Maguire case only to be briefed and argued in this Court.

4. That the decision of this Court in the said case of Commissioner *vs.* Maguire be considered and held to be controlling, and to be the decision of this Court in all of the other seven cases hereinabove entitled: and that, upon the decision of this Court in the case of Commissioner *vs.* Maguire becoming final, like decisions be entered and

orders for like mandates issue in the remaining cases captioned herein upon motion of either party hereto and service of such motion upon the other party.

66 5. In the event that application shall be made by either party to the Supreme Court of the United States for a writ of certiorari in the said case of Guy T. Helvering, Commissioner of Internal Revenue, Petitioner on Review, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents on Review, then, pending final disposal of said case by the Supreme Court, no Order for Mandate or Mandate shall issue in any of the other seven cases, and upon final disposition of said case by the Supreme Court, an Order for Mandate and Mandate similar to those which may be made and issued by this Court in the said Maguire case shall be made and issued by the Court in each of the said other cases.

6. The Clerk of this Court is hereby directed to transmit to the Clerk of the United States Board of Tax Appeals eight certified copies of this Order, one of such certified copies to be incorporated in the record on review of each of the causes herein and transmitted therewith to this Court by the Clerk of the United States Board of Tax Appeals at the time such records are certified and transmitted.

By the Court.

William M. Sparks,
U. S. Circuit Judge.

Dated at Chicago, Illinois, July 7, 1939.

67 UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages, numbered from 1 to 3, inclusive, contain a true copy of the order signed by Hon. William M. Sparks, Circuit Judge, on July 7, 1939, in the following cases: B. T. A. No. 72216 Guy T. Helvering, Commissioner of Internal Revenue *vs.* Jeremiah D. Maguire, et al. B. T. A. No. 90338, Guy T. Helvering, Commissioner of Internal Revenue *vs.* Harold H. Swift. B. T. A. No. 90339, Guy T. Helvering, Commis-

sioner of Internal Revenue *vs.* Gustavus F. Swift. B. T. A. No. 90340, Guy T. Helvering, Commissioner of Internal Revenue *vs.* Charles H. Swift. B. T. A. No. 90341, Guy T. Helvering, Commissioner of Internal Revenue *vs.* Charles H. Swift, et al., Executors, etc. B. T. A. No. 90342, Guy T. Helvering, Commissioner of Internal Revenue *vs.* Louis F. Swift, Jr., et al., Executors, etc. B. T. A. No. 90343, Guy T. Helvering, Commissioner of Internal Revenue *vs.* Helen Swift Neilson. B. T. A. No. 90344, Guy T. Helvering, Commissioner of Internal Revenue *vs.* George H. Swift. October Term, 1938, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 12th day of July, A. D. 1939.

Frederick G. Campbell,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

69 UNITED STATES BOARD OF TAX APPEALS

Washington.

Commissioner of Internal Revenue, *Petitioner,*
vs.
Jeremiah D. Maguire & Ruth S. Maguire, *Respondents.* } Docket No. 72116.

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 76, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 7th day of August, 1939.

B. D. Gamble,
Clerk, United States Board of Tax Appeals.

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UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 57, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the fourteenth day of September, 1939, upon which the following entitled cause was heard and determined:

Cause No. 7049

Commissioner of Internal Revenue,
Petitioner,

vs.

Jeremiah D. Maguire and Ruth S. Maguire,
Respondents,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of August, A. D. 1940.

Kenneth J. Carrick,

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

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At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the fourth day of October, in the year of our Lord one thousand nine hundred and thirty-eight, and of our Independence the one hundred and sixty-third.

Commissioner of Internal Revenue,
Petitioner,
7049 *vs.*
Jeremiah D. Maguire and Ruth S. Maguire,
Respondents.

Petition for Review of Decision of the United States Board of Tax Appeals.

And, to-wit: On the eighteenth day of August, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for respondents, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7049 October Term, 19....

Commissioner of Internal Revenue

vs.

Jeremiah D. Maguire and Ruth S. Maguire.

The Clerk will enter my appearance as counsel for the Respondents.

Francis E. Baldwin,
33 S. Clark St.,
Chicago, Ill.

Endorsed: Filed August 18, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the fifth day of September, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for petitioner, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7049 October Term, 19.....

Commissioner of Internal Revenue

vs.

Jeremiah D. McGuire.

The Clerk will enter our appearance as counsel for the Petitioner.

Sewall Key,
Samuel O. Clark, Jr.,
Department of Justice,
Washington, D. C.

Endorsed: Filed September 5, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-fifth day of September, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for petitioner, which said appearance is in the words and figures following, to wit:

Case No. 7049

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

..... Term, 19....

Commissioner of Internal Revenue,
Petitioner,

vs.

Jeremiah D. Maguire and Ruth S. Maguire,
Respondents.

The Clerk will enter our appearances as Counsel for the petitioner.

J. P. Wenchel,
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.
Charles E. Lowery,
Charles E. Lowery,
Special Attorney, Bureau of Internal Revenue.

Endorsed: Filed September 25, 1939. Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the third day of October, in the year of our Lord one thousand nine hundred and thirty-nine, and of our Independence the one hundred and sixty-fourth.

And afterwards, to-wit: On the thirteenth day of October, 1939, there was filed in the office of the Clerk of this Court, a stipulation relative to misleading statements in the record, which said stipulation is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue,
Petitioner,
vs.
Jeremiah D. Maguire and Ruth S. Maguire,
Respondents.
No. 7049.

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto that the following paragraphs in the Stipulation of Facts contained in the record on appeal in this case, although showing the correct figures, are misleading in their explanation thereof and that they should be deemed by this Court to read as follows:

Paragraph 13, Record 19 (which has already been amended, see Record 21) should read—

"If the basis for determining the profit from sale of said assets so sold by said Union Terminal Trust be decided by the Board to be:

(1) As to assets received by the testamentary trustees from the executors of Gustavus F. Swift, the fair market value thereof on December 11, 1905; (2) as to assets purchased by the testamentary trustees, the cost thereof to them (except that the March 1, 1913, value of assets purchased before that date shall control if it exceeded cost) then the Board may find that the profit from such sale is $3,387,100.29, of which sum one-eighth or $423,387.54 is taxable as capital gain to each petitioner herein in the calendar year 1930."

Paragraph 21, Record 20 should read—

"If the basis for determining the profit from the sale of said assets so sold by said Swift Family Re-

alty Trust, as described in paragraph (16) of this stipulation, be decided by the Board to be:

(1) As to assets received by the testamentary trustees from the executors of Gustavus F. Swift, the fair market value thereof on March 1, 1913; (2) as to assets purchased by the testamentary trustees, the cost thereof to them (except that the March 1, 1913, value of assets purchased before that date shall control if it exceeded cost);

then the Board may find that the profit realized in 1930 from such sale is $1,943,260.45, of which one-eighth, or $242,907.56, is taxable as capital gain to each petitioner herein in the calendar year 1930."

Witness the signatures of the parties hereto by their respective attorneys as of this 4th day of October, 1939.

Guy T. Helvering,
Commissioner of Internal Revenue,
By Samuel O. Clark, Jr.,
By Samuel O. Clark, Jr.,
Assistant Attorney General, Attorney for Petitioner.
Jeremiah D. Maguire,
Ruth S. Maguire,
By Francis E. Baldwin,
By Francis E. Baldwin,
Attorney for Respondents.

Endorsed: Filed October 13, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the sixth day of November, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for petitioner, which said appearance is in the words and figures following, to-wit:

Case No. 7049

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

..... Term, 19.....

Commissioner

vs.

Jeremiah D. Maguire and Ruth S. Maguire.

The Clerk will enter our appearances as Counsel for the Petitioner.

Samuel O. Clark, Jr.,
Assistant Attorney General,
Sewall Key,
Arthur A. Armstrong,
Special Assistants to the Attorney General.

Endorsed: Filed November 6, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the ninth day of February, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, February 9, 1940.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Commissioner of Internal Revenue, *Petitioner,*		Petition for Review of Decision of the United States Board of Tax Appeals.
7049	*vs.*	
Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*		

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. Arthur A. Armstrong, counsel for petitioner, and by Mr. Francis E. Baldwin, counsel for respondent, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the fifth day of March, 1940, there was filed in the office of the Clerk of this Court, the opinion of the Court which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7049. October Term, 1939, January Session, 1940.

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*

vs.

JEREMIAH D. MAGUIRE and RUTH S. MAGUIRE, *Respondents.*

On Petition for Review of Decision of the United States Board of Tax Appeals.

March 5, 1940.

Before EVANS, MAJOR and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* This is a petition to review an order of the Board of Tax Appeals, in a proceeding for determination of an alleged deficiency in respondent's income tax for the calendar year 1930. The Commissioner of Internal Revenue had asserted a deficiency of $71,429.62. The Board on March 29, 1939 entered its order finding a deficiency in the amount of $46,443.60.

Gustavus Swift, a resident of Illinois, died on March 29, 1903. He left surviving him his widow and nine children, one of whom, Ruth S. Maguire, and her husband are the respondents herein. He left a will which was duly admitted to probate in the Probate Court of Cook County, Illinois, on May 2, 1903, in which he devised and bequeathed to his executors and trustees in trust his residuary estate, to hold the same and to pay certain payments annually commencing with the date of his death and continuing until the final distribution of his estate.

By clause 8 of his will the trustees were directed to distribute the corpus not less than ten nor more than twenty years after his death among his widow and children in certain specified proportions.

On December 11, 1905 the Probate Court of Cook County entered an order approving the final account of and discharging the executors, and directed them to turn over to themselves as trustees the balance of the estate in accordance with the provisions of the will. Thereafter, the trustees continued to administer the estate as such trustees until March 29, 1923, when the securities received by the trustees, together with other securities subsequently purchased by them, were distributed in kind to the respondent Ruth S. Maguire. Thereafter in 1929 and 1930 certain of the securities were sold.

The taxing statute provides that in the case of property *acquired after 1913* the basis for determining gain or loss is cost. § 113(a), Revenue Act of 1928, c. 852, 45 Stat. 818. However, as to real property passing by will and personal property specifically bequeathed, the basis is the value of the property at the death of the testator; except that as to personal property passing by general bequest, the basis is the "value of the property at the time of the distribution to the taxpayer." § 113(a)(5).

The taxing statute also provides that in the case of property *acquired before 1913* the basis is cost or 1913 value, whichever is greater. § 113(b). However, as to real property passing by will and personal property specifically bequeathed, the basis is value at death or 1913 value, whichever is greater; except that as to personal property passing by general bequest, the basis is value at distribution to the taxpayer or 1913 value, whichever greater. § 113(b).

In the instant case the property in question was personal property, consisting of shares of capital stock of certain corporations, certain accounts and notes receivable. Some passed under the will by general bequest, and was distributed by the executors to the testamentary trustees in 1905. Some property was purchased by the trustees between 1905 and 1913, and some was purchased between 1913 and 1923. In 1923 the testamentary trustees delivered the properties to the taxpayer.

The taxpayer reasons that the property in question was property acquired by will, and therefore the basis is its value at the time of distribution to the taxpayer. In this regard she contends that although some of the property was purchased by the testamentary trustees, it nevertheless was acquired under and pursuant to the will.[1] On the other hand, the Government argues that the property subse-

quently purchased by the trustees was acquired by purchase. As to this property the Government contends that the basis is its cost to the trustees.[2]

This court must answer two questions in this case: (1) To what does the language "distribution to the taxpayer" refer—distribution by the estate or delivery by the trust? (2) What is the proper basis of the properties received by the taxpayer? In this connection the Board of Tax Appeals agreed with the taxpayer's position, and decided that the basis was the value of the properties in 1923, at which time there was "distribution to the taxpayer."

The controversy here is over the proper construction of a section of the 1928 revenue statute to the effect that in the case of personal property passing by general bequest, the basis is the "value of the property at the time of the distribution to the taxpayer." The term "distribution" might refer to distribution by the estate. *Jenkins* v. *Smith*, 21 F. Supp. 433; Dissenting opinion, *Commissioner* v. *Libbey*, 100 F. (2) 458. Or it might refer to delivery by the testamentary trust. *Harbison* v. *Commissioner*, 26 B. T. A. 896; *Libbey* case, *supra*.

In the light of the conflict of thought on this point, we are not convinced that the express language of the statute is unambiguous and definite, as counsel for taxpayer would have us believe. Every statute is to be construed with reference to its intended scope and to the purpose of the legislature in enacting it; and where language is used which admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and carry out the purpose of the statute, being mindful, however, that it is not permissible under the pretense of interpretation

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1. Taxpayer claims that the date of acquisition, *i. e.*, before or after 1913, is immaterial in the instant case. In saying this, taxpayer proceeds on the theory that no matter when the property was acquired, the property being acquired by virtue of the will takes the basis given for property passing by will, and in this case the following occurs: if the property was acquired after 1913, the basis is the value at time of distribution (claimed to be the year 1923 when the property was delivered to the taxpayer), § 113(a)(5); if acquired before 1913, the basis is still the 1923 value (because greater than 1913 value), § 113(b). Even if the Government agreed as to the point on acquisition, it disagrees as to the date when there is distribution to the taxpayer, claiming the date to be the year 1905 when the estate was closed.

2. In greater detail the Government's contention is as follows. As to property purchased between 1905 and 1913, § 113(b) applies: the basis is cost or 1913 value whichever greater. As to property purchased between 1913 and 1923, § 113(a) applies: the basis is cost. As to these properties, each is acquired by the taxpayer in the year the trustees purchased it, and the cost in each instance is the cost to the trustees in the year of purchase.

to make a law, either by extension or restriction, which shall depart from the legislative intent. In such a situation, resort to aids outside the language itself is necessary. *Brown* v. *Duchesne*, 60 U. S. 183, 194; *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, 464; *Helvering* v. *Morgan's Inc.*, 293 U. S. 121, 126. For instance, often one finds the answer to the controversy in legislative history.

Legislative History. The 1921 to 1926 Acts provided that the basis of property passing by will was its value at the time of such "acquisition." Considerable difficulty was experienced in determining the date of acquisition, particularly in cases where the property was sold by the estate of the decedent. See *Bankers' Trust Co.* v. *Bowers*, 23 F. (2) 941; *cf. McKinney* v. *U. S.*, 62 Ct. Cls. 180. So the language was changed, and as changed incorporated in the 1928 Act. In this connection the legislative comments are pertinent.

The House bill provided that the basis of property passing by will should be its value at the death of the testator, since the "value on the date of death affords an equitable and more readily determinable basis." Ways and Means Committee Report, No. 2, 70th Cong., 1st. Sess., p. 18 (1928 Act). The House bill thereby disposed of the confusion caused by the *McKinney* case, *supra*, by supplying the value-at-death basis to sales of property by the estate, the same basis as used where the property is sold by the beneficiary.

The Senate, however, deemed the House bill weak in one respect, in that it failed to take care of the situation where "the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis * * * for the decedent never owned the property." Finance Committee Report, No. 960, 70th Cong., 1st. Sess., p. 26 (1928 Act). Accordingly, the Senate amended the House bill.

As amended, the bill provided that the basis of property passing by will should be value-at-death, except that the basis of personal property passing by general bequest should be the value "at the time of the distribution to the taxpayer." From what has been said, it would appear that Congress was not looking beyond the distribution by the estate. Lending to this appearance is the weight given to the value-at-death rule and the reason given for the exception thereto. It is also easy to conclude that acquisition by the beneficiary was a factor in the minds of the legislators.

We quote again from the legislators:

> "In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis * * *. The same rule is applied to real and personal property transmitted by the decedent where the sale is made by the executor. In all other cases the basis is the fair market value * * * at the time of distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property * * * transmitted to the beneficiary * * * by general bequest * * *. It would also apply in cases where the executor purchases property and distributes it to the beneficiary." Conference Report, No. 1882, 70th Cong., 1st. Sess., p. 14 (1928 Act).

The change in language was incorporated in the 1928 and 1932 Acts, but the difficulty in administering the section continued. Now the difficulty was in the construction of the words "time of distribution." However, in the meantime, the former language "time of acquisition" had been judicially defined to mean "time of death" of the decedent. *Brewster* v. *Gage*, 280 U. S. 327. The reason for the 1928 change existed no longer, and in 1934 Congress reverted to the former language to the effect that in cases where property is transmitted at death the basis shall be the value at the "time of such acquisition."

Legislative comments in 1934 indicated that the change in the 1934 law was made because the reason for the 1928 language had disappeared and some evils had appeared.[3]

3. We quote material parts from the 1934 legislative reports: "Thus, where a trustee acquires personal property by general bequest, the basis of the property, on a sale by him, is the value at the time of distribution to him. The basis to the executor, in all cases, is the value of the property at the date of decedent's death.

"Often times, the executor and trustee under a will are one and the same person. Thus, in the case of a general bequest of personal property, he is in a position to make use of one basis of valuation or the other * * *. The trustee, of course, may use a later basis than the executor, and where it is desired to sell * * * the executor-trustee may determine whether it would be most advantageous to sell as executor or trustee. Where the personal property has increased in value * * * the property may be distributed to the trustee, who may use the higher basis * * * thereby diminishing the taxable increment * * *." Finance Committee Report, Senate, No. 558, 73rd Cong., 2nd Sess., pp. 34-35 (1934 Act).

The same committee added that the 1934 change made it "clear that if the property of the decedent is sold by the executor or other representative of the estate of the decedent, the basis * * * is the fair market value at the death of decedent, which is the same basis adopted * * * when the property is sold by the beneficiary."

Thus, the legislators expressed concern because the existing law permitted situations where an executor-trustee under a will could sell property either before or after distribution to himself as trustee, thereby avoiding taxable gains which accrued between the death of the testator and the distribution by the estate. No concern, however, was expressed over the consequences inherent in situations which would result from considering delivery by the trustee as the "distribution" meant by the tax statute, thereby permitting avoidance of tax gains accruing between death and distribution by the trustee. The inference is strong that Congress was not looking beyond the distribution by the estate, when it wrote the language in controversy.

"*Distribution to the taxpayer.*" As already mentioned, one often finds the meaning of words by reading their origin and purpose. The bare words "distribution to the taxpayer" tell a plain story when placed in their context and defined in the light of their history. In providing the tax basis for property transmitted at death, Congress did not intend the valuation date to go beyond the time when the estate was closed. The phrase relates to the time when the property is distributed by the executor.

Nor is logic offended by our construction. That the distribution by the estate be to a trustee for the use of the taxpayer in some cases, rather than to the taxpayer himself in every case, matters little. As a matter of logic, where the taxpayer has a substantially vested equitable ownership at the time of distribution to the trustee, then distribution to the trustee is distribution to the taxpayer. The subsequent delivery by the trustee to the taxpayer merely transfers the legal title. *Croxall's Lessee* v. *Sherrerd*, 72 U. S. 268, 281; *Merchant's Loan and Trust Co.* v. *Patterson*, 308 Ill. 519.

We conclude, therefore, that the phrase "time of distribution to the taxpayer" as used in § 113(a)(5) of the 1928 Act means time of distribution by the decedent's estate, and it follows consequently that the time of such distribution in the instant case was December 11, 1905. Moreover, the basis of the property coming to the taxpayer from the executors, through the testamentary trustees, is the 1905 value or the 1913 value of such property, which ever was greater. § 113(b).

Basis of Property Purchased by Trustees. In the instant case the property in question consists of property transmitted at death and of property subsequently purchased by the trustees under powers given in the will. The taxpayer contends that although some of the property was purchased by the trustees, nevertheless she acquired the properties by will, and therefore the properties take the basis as given in § 113(a)(5). *Fleming* v. *Commissioner*, 36 B. T. A. 773, 777; see f.n.1.

That the taxpayer's right in the properties has its source in the provisions of the will, is certain; but certain too are we that this factor does not control the application of the basis section, § 113(a)(b). For our conclusion we depend considerably on the history that has been related above. It is plain therefrom that the legislators distinguished between specific property owned by the decedent and specific property purchased after decedent's death by the trustee. And they also deemed important the time when these properties were acquired.

For our conclusion we also depend considerably on the statutory scheme. In general the statute applies a cost basis to property acquired by the taxpayer.[4] To some situations the statute applies a different basis, *e. g.*, § 113(a)(5). For instance, in the instant case, the statute makes an exception to the cost basis. This exception, however, applies only to "property transmitted at death." To us this means that the exception, *i. e.*, the value-at-death and value-at-distribution basis, is confined to the specific property owned by the testator at his death.

We conclude, therefore, that property purchased by the trustees is not "property transmitted at death," and that as to it the basis is as described in footnote #2. In this connection we may add the following explanation. Where the identical property distributed to the trustees is later delivered to the taxpayer in kind, it may be said that under the statute the taxpayer acquired the property "by will." However, where the trustees buy different property after the distribution, and this property is delivered to the taxpayer, it may be said that it was acquired by purchase and not "by will."

The order of the Board of Tax Appeals is reversed, and

4. A more accurate statement would mention that as to property acquired before 1913, the basis is cost or 1913 value, whichever greater, § 113(b).

the case remanded for further proceedings not inconsistent with the views herein expressed. It is so ordered.

REVERSED AND REMANDED.

Endorsed: Filed March 5, 1940. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the fifth day of March, 1940, the following further proceedings were had and entered of record, to-wit:

Tuesday, March 5, 1940.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Commissioner of Internal Revenue, *Petitioner,* vs. Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	Petition for Review of Decision of the United States Board of Tax Appeals.

7049

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decision entered in this cause on March 29, 1939, by the United States Board of Tax Appeals be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said Board of Tax Appeals for further proceedings not inconsistent with the views expressed in the opinion of this Court.

And afterwards, to-wit: On the eighth day of March, 1940, there was filed in the office of the Clerk of this Court, a motion for extension of time within which to file a petition for rehearing, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue, *Petitioner*, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	No. 7049.

MOTION.

Now come Jeremiah D. Maguire and Ruth S. Maguire, respondents in the above entitled cause No. 7049, and all of the other respondents in the other above entitled causes Nos. 7050, 7051, 7052, 7053, 7054, 7055, and 7056, by their attorneys, and move the court:

(1) That an order be entered herein extending the time to April 4, 1940, within which respondents may file a petition for rehearing upon the decision of this court in the above entitled causes, rendered on March 5, 1940.

By order entered by this court and filed July 14, 1939, the court ordered and directed that in each of the above entitled causes, other than that of Commissioner of Internal Revenue, Petitioner, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents, No. 7049, the decision of this court in said cause of Commissioner *vs.* Maguire should be considered and held to be controlling, and to be the decision of this court in all of the other seven cases hereinabove entitled; and that, upon the decision of this court in the case of Commissioner *vs.* Maguire becoming final, like decisions be entered and orders for like mandates issue in the remaining cases captioned herein upon motion of either party hereto and service of such motion upon the other party.

Said order further provides that in the event application shall be made by either party to the Supreme Court of the United States for a writ of certiorari in the said case of Guy T. Helvering, Commissioner of Internal Revenue, Petitioner on Review *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents on Review, then, pending final disposal of said case by the Supreme Court, no Order for Mandate or Mandate shall issue in any of the

other seven cases, and upon final disposition of said case by the Supreme Court, an Order for Mandate and Mandate similar to those which may be made and issued by this Court in the said Maguire case shall be made and issued by the Court in each of the said other cases.

Respondents submit herewith, in support of this motion, the affidavit of Francis E. Baldwin.

A copy of this motion has been sent by registered mail, return receipt requested, to

Samuel O. Clark, Jr.,
Assistant Attorney General,
Sewall Key,
Arthur A. Armstrong,
Special Assistants to the Attorney General,
Counsel for Petitioner,

and request has been made that said attorneys consent to the granting of said extension.

Respectfully submitted,
Francis E. Baldwin,
Albert H. and Henry Veeder,
Attorneys for Respondents.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue, *Petitioner,* *vs.* Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	No. 7049.

AFFIDAVIT.

State of Illinois, } ss.
County of Cook. }

Francis E. Baldwin, being first duly sworn, on his oath states that he is counsel herein for the above-named respondents; that he has prepared and makes a motion for an extension of time within which to file petition for re-

hearing in the above entitled causes, in order that there may be submitted to this Honorable Court, with said petition for rehearing, the decisions of the United States Circuit Court of Appeals (Second Circuit) in four cases which are pending on appeal in the United States Circuit Court of Appeals (Second Circuit), namely:

Commissioner of Internal Revenue,
Petitioner,
vs.
Richard Van Nest Gambrill,
Respondent,
No. 41

which involves the basis for determining gain or loss on securities sold by said respondent, as fixed by the third sentence of Section 113 (a) (5) of the Revenue Act of 1928, and

Commissioner of Internal Revenue,
Petitioner,
vs.
Marjorie K. Campbell,
Respondent,
No. 257

Commissioner of Internal Revenue,
Petitioner,
vs.
Seymour H. Knox,
Respondent,
No. 258

Commissioner of Internal Revenue,
Petitioner,
vs.
Dorothy K. G. Rogers,
Respondent,
No. 259,

which involve the basis for determining gain or loss on securities sold by said respondents, as fixed by the third sentence of Section 113 (a) (5) of the Revenue Act of 1932.

Affiant further says that said four appeals last above mentioned have been argued in and submitted to the United States Circuit Court of Appeals (Second Circuit)

and may be decided within the time requested herein for filing petition for rehearing.

Further affiant saith not.

Francis E. Baldwin.

Subscribed and sworn to before me this 8th day of March, A. D. 1940.

Samuel O. Pearce,
Notary Public.

(Seal)

Endorsed: Filed March 8, 1940. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the fifteenth day of March, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, March 15, 1940.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.

Commissioner of Internal Revenue, *Petitioner,* *vs.* Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	Petition for Review of Decision of the United States Board of Tax Appeals.

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On motion of counsel for respondents, it is ordered that the time for filing a petition for rehearing in this cause be, and it is hereby extended until the further order of this Court, said extension not to expire before April 5, 1940.

And afterwards, to-wit: On the third day of April, 1940, there was filed in the office of the Clerk of this Court, a motion for further extension of time within which to file a petition for rehearing, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue, *Petitioner,* *vs.* Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	No. 7049.

MOTION.

Now come Jeremiah D. Maguire and Ruth S. Maguire, respondents in the above-entitled cause No. 7049, and all of the other respondents in the other above-entitled causes Nos. 7050, 7051, 7052, 7053, 7054, 7055 and 7056, by their attorneys, and respectfully represent:

(1) That on March 15, 1940, this Honorable Court entered an order extending the time for filing petition for rehearing in the above-entitled causes until the further order of this Court, said extension not to expire before April 5, 1940;

(2) That in the affidavit of the undersigned, attached to motion of Jeremiah D. Maguire and Ruth S. Maguire, respondents in cause No. 7049, filed in this Court on March 8, 1940, it was stated that there were pending in the United States Circuit Court of Appeals (Second Circuit) four cases, the titles and numbers of which were set forth in said affidavit; that one of said cases involved the basis for determining gain or loss on the sale of securities by the respondent in said case, as fixed by the third sentence of Section 113 (a) (5) of the Revenue Act of 1928; and that the other three of said cases involved the basis for determining gain or loss on the sale of securities by the respondents in said cases, respectively, as fixed by the third sentence of Section 113 (a) (5) of the Revenue Act of 1932. Said Section 113 (a) (5) of the Revenue Act of 1928 and Section 113 (a) (5) of the Revenue Act of 1932 are identical;

(3) That in said affidavit of the undersigned affiant stated that said motion for an extension of time within which to file petition for rehearing in the above entitled causes was made in order that there might be submitted to this Honorable Court, with said petition for rehearing, the decisions of the United States Circuit Court of Ap-

peals (Second Circuit) in said four cases, which cases had been argued and submitted to the United States Circuit Court of Appeals (Second Circuit) on February 15, 1940;

(4) That no decision in any of said four cases has been rendered by said United States Circuit Court of Appeals (Second Circuit).

Respondents herein pray this Honorable Court to grant a further extension of fifteen (15) days from April 5, 1940, within which to file petition for rehearing in the above entitled causes.

Respondents submit herewith, in support of this motion, the affidavit of Francis E. Baldwin.

A copy of this motion has been sent by registered mail, return receipt requested, to

Samuel O. Clark, Jr.,
Assistant Attorney General,
Sewall Key,
Arthur A. Armstrong,
Special Assistants to the Attorney General,
Counsel for Petitioner,

and request has been made that said attorneys consent to the granting of said extension.

Respectfully submitted,
Francis E. Baldwin,
Albert H. and Henry Veeder,
Attorneys for Respondents.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue, *Petitioner,* *vs.* Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	No. 7049.

AFFIDAVIT.

State of Illinois, } ss.
County of Cook. }

Francis E. Baldwin, being first duly sworn, on his oath states that he is counsel herein for the above-named re-

spondents; that he has prepared and makes a motion for an extension of fifteen (15) days from April 5, 1940, within which to file petition for rehearing in the above entitled causes, in order that there may be submitted to this Honorable Court, with said petition for rehearing, the decisions of the United States Circuit Court of Appeals (Second Circuit) in four cases which are pending on appeal in the United States Circuit Court of Appeals (Second Circuit), namely:

Commissioner of Internal Revenue,
Petitioner,
vs.
Richard Van Nest Gambrill,
Respondent.
No. 41

Commissioner of Internal Revenue,
Petitioner,
vs.
Marjorie K. Campbell,
Respondent.
No. 257

Commissioner of Internal Revenue,
Petitioner,
vs.
Seymour H. Knox,
Respondent.
No. 258

Commissioner of Internal Revenue,
Petitioner,
vs.
Dorothy K. G. Rogers,
Respondent.
No. 259

Affiant further says that said four appeals last above mentioned have been argued in and submitted to the United States Circuit Court of Appeals (Second Circuit), but that no decision in any of said four cases has been rendered by said United States Circuit Court of Appeals (Second Circuit).

Further affiant saith not.

Francis E. Baldwin.

Subscribed and sworn to before me this 3rd day of April, A. D. 1940.

Albert L. Lettermann,
(Seal) *Notary Public.*

Endorsed: Filed April 3 1940. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the fourth day of April, 1940, the following further proceedings were had and entered of record, to-wit:

Thursday, April 4, 1940.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.

Commissioner of Internal Revenue, *Petitioner,* vs. Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	Petition for Review of Decision of the United States Board of Tax Appeals.

7049

On motion of counsel for respondents, it is now here ordered that the time for filing the petition for a rehearing be extended for a period of fifteen days from April 5, 1940.

And afterwards, to-wit: On the seventeenth day of April, 1940, there was filed in the office of the Clerk of this Court, a petition for rehearing, which said petition for rehearing is not copied here.

And afterwards, to-wit: On the twenty-first day of May, 1940, the following further proceedings were had and entered of record, to-wit:

Tuesday, May 21, 1940.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Commissioner of Internal Revenue, *Petitioner,* *vs.* Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	Petition for Review of Decision of the United States Board of Tax Appeals.

7049

It is ordered by the Court that the petition for a rehearing of this cause be, and it is hereby denied.

And afterwards, to-wit: On the tenth day of June, 1940, there was filed in the office of the Clerk of this Court, a motion to stay the mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue, *Petitioner,* *vs.* Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	No. 7049.

MOTION.

Now come Jeremiah D. Maguire and Ruth S. Maguire, respondents in the above entitled cause No. 7049, and all of the other respondents in the other above entitled causes

Nos. 7050, 7051, 7052, 7053, 7054, 7055 and 7056, by their attorneys, and shows the court:

(1) That this Honorable Court on March 5, 1940, rendered its decision in the above entitled cause of Commissioner of Internal Revenue, Petitioner, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents; that on April 19, 1940, petition for rehearing was filed by said respondents; that on May 21, 1940, this Honorable Court denied said petition for rehearing;

(2) That by order entered by this Court and filed July 14, 1939, the Court ordered and directed that in each of the above entitled causes, other than that of Commissioner of Internal Revenue, Petitioner, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents, No. 7049, the decision of this Court in said cause of Commissioner *vs.* Maguire should be considered and held to be controlling, and to be the decision of this Court in all of the other seven cases hereinabove entitled; and that upon the decision of this Court in the case of Commissioner *vs.* Maguire becoming final, like decisions be entered and orders for like mandates issue in the remaining cases captioned herein upon motion of either party hereto and service of such motion upon the other party;

(3) That said order further provided that in the event application shall be made by either party to the Supreme Court of the United States for a writ of certiorari in the said case of Guy T. Helvering, Commissioner of Internal Revenue, Petitioner on Review, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents on Review, then, pending final disposal of said case by the Supreme Court, no order for mandate or mandate shall issue in any of the other seven cases, and upon final disposition of said case by the Supreme Court, an order for mandate and mandate similar to those which may be made and issued by this Court in the said Maguire case shall be made and issued by the Court in each of the said other cases.

Respondents intend to file in the Supreme Court of the United States a petition for a writ of certiorari to review the decision of this Court in the above entitled case of Commissioner of Internal Revenue, Petitioner, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents, and for that reason said respondents hereby pray that the execution and enforcement of the judgment of this Honorable Court entered herein may be stayed for a reasonable

time to enable the respondents to apply for and to obtain a writ of certiorari from the Supreme Court of the United States.

Respectfully submitted,
Francis E. Baldwin,
Albert H. & Henry Veeder,
Attorneys for Respondents.

State of Illinois, }
County of Cook. } ss.

Francis E. Baldwin, being first duly sworn, on his oath states that he is one of counsel for the above-named respondents; that he has caused a copy of this Motion for Stay of Mandate in the above entitled cause to be sent by registered mail, return receipt requested, to

Samuel O. Clark, Jr.,
Assistant Attorney General,
Sewall Key,
Arthur A. Armstrong,
Special Assistants to the Attorney General,
Washington, D. C.,
Counsel for Petitioner.

Francis E. Baldwin.

Subscribed and sworn to before me this 19th day of June, A. D. 1940.

Robert E. Fisher,
Notary Public.

(Seal)
FEB:C

Endorsed: Filed June 10, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the eleventh day of June, 1940, the following further proceedings were had and entered of record, to-wit:

Tuesday, June 11, 1940.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.

Commissioner of Internal Revenue, *Petitioner,* vs. Jeremiah D. Maguire and Ruth S. Maguire, *Respondents.*	Petition for Review of Decision of the United States Board of Tax Appeals.

7049

On motion of counsel for respondents, it is ordered that the mandate of this Court in this cause be, and it is hereby, stayed pursuant to Rule 25 of the rules of this Court.

And afterwards, to-wit: On the twelfth day of June, 1940, there was filed in the office of the Clerk of this Court, a motion for permission to file petition for reconsideration of respondents' petition for rehearing etc., which said motion is in the words and figures following, to-wit:

No. 7049.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue,
Petitioner,
vs.
Jeremiah D. Maguire and Ruth S. Maguire,
Respondents.

Petition for Review of Decision of the United States Board of Tax Appeals.

MOTION FOR PERMISSION TO FILE PETITION FOR RECONSIDERATION BY THIS COURT OF RESPONDENTS' PETITION FOR REHEARING AND FOR LEAVE TO MAKE ORAL ARGUMENT THEREON.

Now come Francis E. Baldwin and Albert H. & Henry Veeder, attorneys for respondents, and respectfully petition this Court that leave be granted to respondents to file petition for reconsideration by this Court of Respondents' Petition for Rehearing, which was denied by this Court by order entered in this cause on May 21, 1940.

In support of this motion, the attention of this Court is respectfully directed to the decision in favor of the taxpayers rendered by the United States Circuit Court of Appeals for the Second Circuit on June 10, 1940, in the following cases:

Commissioner of Internal Revenue,
Petitioner,
vs.
Richard Van Nest Gambrill,
Respondent.
No. 41.

Commissioner of Internal Revenue,
Petitioner,
vs.
Marjorie K. Campbell,
Respondent.
No. 257.

Commissioner of Internal Revenue,
Petitioner,
vs.
Seymour H. Knox,
Respondent.
No. 258.

Commissioner of Internal Revenue,
Petitioner,
vs.
Dorothy K. G. Rogers,
Respondent.
No. 259.

in each of which cases the principal question for decision was identical with the question for decision by this Honorable Court in the above-entitled case of Commissioner of Internal Revenue, Petitioner, *vs.* Jeremiah D. Maguire and Ruth S. Maguire, Respondents, namely, the basis to be used in determining gain or loss, under Section 113 (a) (5) of the Revenue Act of 1928 and Section 113 (a) (5) of the Revenue Act of 1932 (which sections were identical), resulting from the sale by remainderman of securities passing by general bequest through a testamentary trust, some of which securities were owned by the testator at the time of his death, some were purchased by the executor after the testator's death before setting up the trust, and some were purchased by the trustee after the trust was established. The Circuit Court of Appeals (Second Circuit) in each of said cases held that under section 113 (a) (5) of the 1928 and 1932 Revenue Acts, the basis for determining gain or loss from the sale of such securities, which were delivered to the taxpayer by the trustee after

the right to possession became fixed by termination of the prior beneficial estate, was the fair market value of the property at the time of the delivery to the taxpayer. A copy of said decision of the United States Circuit Court of Appeals (Second Circuit) is hereto attached and made a part hereof.

Respondents respectfully pray that this motion be granted and that, upon reconsideration by this Honorable Court of Respondents' Petition for Rehearing, oral argument thereon be permitted.

Respectfully,
Francis E. Baldwin,
Albert H. & Henry Veeder,
Attorneys for Respondents.

State of Illinois, }
County of Cook. } ss.

Francis E. Baldwin, being first duly sworn, on his oath states that he is one of counsel for the above-named respondents; that he has caused a copy of this Motion for Permission to File Petition for Reconsideration by this Court of Respondents' Petition for Rehearing and for Leave to Make Oral Argument thereon in the above-entitled cause to be sent by registered mail, return receipt requested, to

Samuel O. Clark, Jr.,
Assistant Attorney General,
Sewall Key,
Arthur A. Armstrong,
Special Assistants to the Attorney General,
Washington, D. C.,
Counsel for Petitioner.

Francis E. Baldwin.

Subscribed and sworn to before me this 12th day of June, A. D. 1940.

Robert E. Fisher,
Notary Public.

(Seal)

FEB:C

Endorsed: Filed June 12, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the ninth day of July, 1940, there was filed in the office of the Clerk of this Court, a motion for further stay of mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue,
Petitioner,
vs.
Jeremiah D. Maguire and Ruth S. Maguire,
Respondents.
No. 7049.

MOTION.

Now come Jeremiah D. Maguire and Ruth S. Maguire, respondents in the above-entitled cause No. 7049, and all of the other respondents in the other above-entitled causes, Nos. 7050, 7051, 7052, 7053, 7054, 7055 and 7056, by their attorneys, and respectfully represent:

(1) That on June 11, 1940, this Honorable Court, upon motion of Jeremiah D. Maguire and Ruth S. Maguire, respondents in the above-entitled cause No. 7049, and all of the other respondents in the other above-entitled causes, Nos. 7050 to 7056, both inclusive, entered its order staying mandate of this Court, pursuant to Rule 25 of this Court, to July 11, 1940;

(2) That on June 12, 1940, said Jeremiah D. Maguire and Ruth S. Maguire filed in this Court their motion for permission to file petition for reconsideration by this Court of Respondents' Petition for Rehearing and for leave to make oral argument thereon, and that no order upon said petition has been entered by this Court.

Respondents hereby pray that the execution and enforcement of the judgment of this Honorable Court entered herein may be stayed for a further period of not less than thirty (30) days from the date hereof.

Dated at Chicago, Illinois, this 9th day of July, 1940.

Francis E. Baldwin,
Albert H. & Henry Veeder,
Attorneys for Respondents.

State of Illinois, }
County of Cook. } ss.

Francis E. Baldwin, being first duly sworn, on his oath states that he is one of counsel for the above-named respondents; that he has caused a copy of this Motion for further stay of mandate in the above-entitled cause to be sent by registered mail, return receipt requested, to

Samuel O. Clark, Jr.,
Assistant Attorney General,
Sewall Key,
Arthur A. Armstrong,
Special Assistants to the Attorney General,
Washington, D. C.,
Counsel for the Commissioner of Internal Revenue.

Francis E. Baldwin.

Subscribed and sworn to before me this 9th day of July, A. D. 1940.

William B. Elson, Jr.,
Notary Public.

(Seal)
FEB:C

Endorsed: Filed July 9, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the tenth day of July, 1940, the following further proceedings were had and entered of record, to-wit:

Wednesday, July 10, 1940.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Commissioner of Internal Revenue,
Petitioner,
vs.
7049
Jeremiah D. Maguire and Ruth S. Maguire,
Respondents.

Petition for Review of Decision of the United States Board of Tax Appeals.

It is ordered by the Court, that the motion of counsel for respondents for permission to file a petition for reconsideration by this Court of respondents' petition for rehearing, be, and the same is hereby denied.

And on the same day, to-wit: On the tenth day of July, 1940, the following further proceedings were had and entered of record, to-wit:

Wednesday, July 10, 1940.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Commissioner of Internal Revenue,
Petitioner,
vs.
7049
Jeremiah D. Maguire and Ruth S. Maguire,
Respondents.

Petition for Review of Decision of the United States Board of Tax Appeals.

On motion of counsel for respondents, it is ordered by the Court that the issuance of the mandate in this cause be stayed an additional thirty days.

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UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 61 to 93, inclusive, contain a true copy of proceedings had and papers filed (excepting motion for leave to file brief of Amicus Curiae in answer to petition for rehearing and order thereon) in the following entitled cause:

Cause No. 7049.

Commissioner of Internal Revenue,
Petitioner,

vs.

Jeremiah D. Maguire and Ruth S. Maguire,
Respondents,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of August, A. D. 1940.

Kenneth J. Carrick,

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

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SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.